UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

IN RE:	)	
	)	
GARLOCK SEALING TECHNOLOGIES LLC, et al,	)	No. 10-BK-31607
	)	
Debtors.	)	VOLUME XIII-A
	)	MORNING SESSION

TRANSCRIPT OF ESTIMATION TRIAL
BEFORE THE HONORABLE GEORGE R. HODGES
UNITED STATES BANKRUPTCY JUDGE
AUGUST 7, 2013

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I N D E X

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P R O C E E D I N G S

AUGUST 7, 2013, COURT CALLED TO ORDER 9:30 A.M.:

THE COURT: Good morning. Just housekeeping-wise. We think we've got this courtroom Monday. The district court clerk is checking, so it may not be necessary -- I think I can be able to confirm that after lunch, probably.

The other thing is that it looks like we could go another day and could do that Tuesday. We will give -- I will give Garlock another day to do its rebuttal. We'll add one more day on. I don't know -- I won't decide anything about that now. I'll leave that for you all to discuss because I know it --

MR. GUY: I can't do that Tuesday.

THE COURT: I know. I know it impacts everybody. So let me just ask what we'll do -- we'll give Garlock one more day and Coltec to try to get you all's people in as best you can. But that's the most we can -- that's the most I will do is one more day.

MR. SWETT: Your Honor, I understand that Dr. Heckman, Mr. Clodfelter's expert can only be here Friday afternoon and that's fine with us.

MR. CLODFELTER: That's correct.

THE COURT: Okay. We'll try to work around -- I I'll let you all talk about when you could do one more day. That extra day would have to be downstairs, I think. But --

and you all's -- we can work around your schedules probably better than you can work around ours, because I know you've got a whole lot of people. But I would ask that you try to do that in the next couple weeks, rather than delay things much more than that. So, we'll go with that. At lunch time I'll kind of scratch out where I will be. We've already eliminated one Asheville term of court, and so I need to go do that next week -- week after next for two days, or it will be two months, be all kinds of people riding around in cars they hadn't paid for.

It's going to be unusual to get back to the things we normally do, doublewides and '72 Chevys and that kind of thing. Okay.

MR. CASSADA: You'll probably welcome to go back to that world.

Another housekeeping --

THE COURT: I never knew I would be so happy to deal with a doublewide case again.

MR. CASSADA: Another housekeeping matter I believe that I had mentioned yesterday we would spend some time this morning offering exhibits and some other things.

Mr. Swett and I conferred and believe it would be most efficient to pick a time between now and the end where we both do those -- introduce exhibits.

THE COURT: That's fine. We can --

MR. CASSADA: We don't interrupt the flow of the witnesses.

THE COURT: Anything you all are -- anything you all are agreed on, I'm going to admit. If you've not agreed on it, then I will rule on it.

MR. CASSADA: The reason we brought it up now, there's been a little bit of a blurring of the line of our case in chief and the rebuttal case. And for now we're not really focused on that distinction. We'll just get all the evidence in, in the days we have assigned to us.

THE COURT: All right. Thank you.

Mr. Swett, I believe that --

MR. SWETT: Yes, sir.

Your Honor, the Committee calls David McClain.

DAVID McCLAIN,

Being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. SWETT:

Q. Good morning, sir.

A. Good morning.

Q. Would you please state your full name for the record.

A. David Mendel McClain.

Q. Where do you live?

A. I live in California -- Piedmont, California.

Q. What is your work?

A. I'm an asbestos lawyer.
Q. How long have you been that?
A. Since 1981.
Q. Where did you go to law school?
A. University California, Hastings School of Law.
Q. Have you been continuously engaged in asbestos personal injury tort litigation since 1981?
A. I have.
Q. Where do you work?
A. I work with a firm called Kazan, McClain, Lyons, Greenwood and Oberman.
Q. When did you join the firm?
A. 1983.
Q. What is your present role in that firm's practice?
A. I'm the senior partner. I do much of the settlements. I oversee the trials, strategy, tactics, just generally manage the office.
Q. Are you still personally engaged in trial practice?
A. I am, but not as much as I used to be, but I still am.
Q. Can you please describe for the court, in general terms, the Kazan firm's practice and the focus of its work in asbestos litigation?
A. When -- I've been attorney since 1972. I joined them in 1983. At the time I joined the Kazan firm, it was Steven Kazan law corporation, the only partner. And they were, like

almost all firms, primarily filing nonmalignant cases. We did have some malignant cases, and some mesotheliomas, predominant amount of work we did was for nonmalignant asbestos injury victims. We changed that model in the latter part of the '80s, to basically focus only on malignancies, and then within a couple years after that, only mesotheliomas, and have maintained that focus from then to today.

Q. Was that an unusual model for an asbestos litigation practice when you first adopted it?

A. Yeah. I think we were the only ones in the country, that I was aware of, that did that. And we thought that that was the way to go, the way the litigation was going, and the best way for all firms to go. And we campaigned others to try and take that role in the litigation.

We were unsuccessful for awhile, but eventually almost all firms have now gone to mesothelioma only. There are a couple main firms that have not. But almost all the firms, except one in California I know of, and throughout the United States most of the other firms have gone to that model now.

Q. Let me back up just a bit, and you mentioned that you've been a lawyer since 1972.

Generally speaking, what kind of legal work were you doing from that time, until you joined the -- got into the asbestos litigation?

A. Initially, I was a legal aid lawyer. I did legal aid for

a couple years, and then I started my own firm with two other partners, and we did everything. We did bankruptcy, drunk driving, divorces, civil litigation, and criminal litigation. And then I started focusing on asbestos only in 1981.

Q. I see. Is the Kazan firm still located in the Bay area?

A. It is, in Oakland, California.

Q. In your previous experience before joining that firm, did you practice in Los Angeles?

A. I did for a little over a year doing asbestos work.

Q. Mr. McClain, do you remember your first asbestos trial while at the Kazan firm?

A. I do.

Q. Could you tell the judge about that, please.

A. It was the case of Mr. Dickerson versus Southern Pacific Railroad, Mr. Dickerson had mesothelioma. We went to trial. Southern Pacific was not willing to settle. They had previously tried 10 mesothelioma cases around the country, and it defensed every single one of them. They thought that the -- they couldn't be beat. The exposures were in the 1940s. There was no theory of strict liability against the railroad, you had to prove negligence. And they thought that it couldn't be proven. I went to trial in that case, I won that case. And after I won that case, that kind of changed the whole -- everything else and the railroad started losing almost every case -- most of the cases after that.

Q. You used a term that "they defensed" 10 cases in a row. Explain for the record what that term means?
A. That means they got a defense verdict, the plaintiff took zero.
Q. Now after you had your victory at trial against Southern Pacific, did their posture change with respect to settlement?
A. Of course.
Q. What posture did they adopt after that?
A. They now realized they could get hit, and get hit hard. And that these cases were valuable. And that we could demonstrate negligence on their behalf, and the jury would understand their negligence.
Q. Did there come a time, sir, when your work at the Kazan firm became more trial intensive, more focused on trial?
A. Yes, it did. Yes, it was.
Q. How did that come about?
A. We had tried some cases in the '80s. And -- but in the early 1990s, around 1991, late '91 I think it was, maybe early '92 -- I think it was '91. Bruce Tucker from Owens Corning Fiberglass in Boston, one of their key counsels, flew out to meet with me personally in San Francisco -- in Oakland. I had been doing all the settlements from my office at the time.

And he said that they looked at their national averages, and they were paying us twice as much on a settlement on the same type of case, 63-year old, as they were paying the

average firm around the United States and that had to stop. That they would now only pay us half of what they had been paying us on average for our cases.

I tried to explain to Bruce that there was a reason that was true. We had a good jurisdiction. Alameda County was a good jurisdiction. We had good cases, and we worked them up.

He said it didn't matter. They were going to pay us half. And otherwise, if we didn't accept half, they were going to bankrupt us, because they would not settle one case. They would try every case against us. They would bring their best lawyers from all over the country to try the cases. And if they lost, they would appeal every case, and we wouldn't get any money for years, and that would bankrupt our firm.

Q. How did you react to that?

A. I said, I'm sorry Bruce. These are the values. We demonstrated why they're earned, and we're not going to cut our values in half.

Q. What happened then?

A. An onslaught of trials. Before this -- you have to understand, Owens Corning Fiberglass settled every single case in the nation. They were the first to settle. They were the most reasonable defendant in the litigation. They came early. Once you filed a case, they sat down and met with you and they settled the cases. And many of the defendants thought they were paying too much because they settled early, and said the

easiest -- they're the easiest defendant in the litigation. But actually in looking back when I'd get to trial in those cases, I felt that they sometimes paid too little, but they were reasonable.

Well, they still maintained settling with every other firm in the country, except they went to war with us for about nine months. All their focus was on us. And so -- and then that continued -- so we tried a whole bunch of cases, and that continued for a few years.

But after nine months they started trying cases across the country -- across the country against a lot of other firms nationally -- they then went to war -- first they went to war against us, and then they went to war against the whole plaintiff's bar.

Q. In the phase of intensive litigation, was your firm in more than one courtroom at a time litigating against Owens Corning?

A. We were.

Q. What was the impact of that change in approach by Owens Corning on plaintiffs in the tort system?

A. Well, in retrospect, it was the best thing that ever happened to us. We went to trial. We won every single trial except one. We got huge verdicts. They had to pay us multiples and multiples and multiples, orders of magnitude sometimes, more than they would have had to pay us in

settlement. And they lost every single case except the one. And that started happening across the country, too. They started losing other cases.

And so -- although it was intense and a lot of work, all our focus was on OCF for a few years. We then proved -- it helped us with all the other defendants, too. We proved the value of these cases in the tort system. Because we were getting big verdicts, and that increased the settlements, not only to OCF when they stopped trying every case, but also during that time to all the other defendants, too.

Q. We've heard some talk from previous witnesses about something called an "Owens Corning Picture Book", are you familiar with that?

A. I am.

Q. Can you explain to the judge what that was about?

A. So, yeah, it's complicated. Owens Corning went in stages. First they settled everything, then they tried everything.

And then they weren't successful in the trials, so they decided that one of the reasons they weren't successful is perhaps the plaintiffs couldn't remember some of the other products they were exposed to. And so they thought maybe we could refresh the plaintiff's recollection if we showed them pictures of the products. Most of these people were exposed 40 years ago, and remembering names is difficult of the --

especially if you weren't using them yourself.

And so they created a notebook that they handed out to all plaintiffs firms, that had the photos of every product that they could possibly find in the entire -- that was ever produced or manufactured, asbestos product.

So they went to us and they said, please use these notebooks with your client, because we think they can identify other products, and therefore you can sue those other companies that you're not suing now.

So we started using those. And then that didn't help, because sometimes a couple -- a few clients would recognize something or would refresh their recollection, but it wasn't that much.

And so finally when they kept losing, they then changed the nature and they went into a massive settlement program, and they started settling every case again.

Q. What time period was that?

A. After the mid-'90s, maybe latter part of the mid-'90s.

Q. Did the use of the picture book become common in the tort system?

A. For a while.

Q. Let's shift focus and talk a little bit about the nature of the cases in your jurisdictions where you practice.

What causes of action are available in California to a mesothelioma victim?

A. You have several that we normally see. You have strict liability. And under strict liability there are two prongs. You -- the first prong is what's called consumer expectations. And that is to prove liability against a defendant, you have to prove that the product was not as safe as an ordinary consumer would expect.

So in trials we obviously have witnesses testify that when they were around asbestos products, whether they were using them or somebody else was using them, and they were around the dust, that they didn't expect to get cancer from asbestos being in the workplace.

What we usually do with a jury is -- this courtroom's not painted, but most courtrooms are painted where we are. We said, as we sit here in this courtroom, if this paint is emitting odorless fumes that can cause cancer, none of us believe that sitting here in this courtroom that we're going to get cancer from this paint. Therefore, the paint is not as safe as an ordinary consumer would expect. Because nobody expects to get paint -- get cancers from sitting in this courtroom. And that's the analogy about asbestos. People who were around asbestos, didn't expect to get cancer from it. So that's the one cause of action, consumer expectations.

Another cause of action under strict liability is failure to warn. And in failure to warn, we have to prove that the defendant failed to warn of dangers it knew or should have

known.

Now in California, a manufacturer or a seller of a product is held to the standard of an expert. Therefore, they're held to the standard that they had to know all medical and scientific literature when they produced a product.

It is easy to show that in the 1930s, asbestos was known to be dangerous and a killer. And so if they didn't warn and put a warning -- an adequate warning on the product or box that said cancer, could kill, et cetera, then we believe, and the juries have found that they -- they are liable because of failure to warn.

There's also a negligence theory. A negligence failure to warn, where -- what they knew and didn't warn. Most of these companies actually knew about the dangers of asbestos.

And there is -- then there's a fraud theory, and then there's, of course, punitive damages.

Q. Now you've been describing the victim's personal action for tort, correct?

A. That's correct.

Q. Are there other causes of action available to the victim's family members?

A. When we get a client who is dying of mesothelioma, we file a personal injury case for the client himself or herself who's dying, and a loss of consortium claim for the wife. The wife is, in California and other jurisdictions, is felt to be

harmed because of the injury to -- his or her spouse.

Additionally, once the mesothelioma victim dies, we file a wrongful death claim on top of that, which is the loss of love, care, support, from the time of death, all the way to the time of his normal life or her life expectancy, for both the wife and all of the dependents, kids or parents or grandchildren, whoever is dependent. And kids, even if they're not dependent are -- have a claim also in a wrongful death suit.

Q. Is there a separate claim known as a survival action?

A. There is.

Q. What is that?

A. That's for the estate. If you haven't settled with the defendant in the personal injury case and the -- or you discover that defendant's liability after that case is over, you can file -- the estate can file a survivor action that attempts to collect some wage loss up to the time of death, and some medical expenses, and punitive damages.

Q. Shifting back to the personal injury tort claim of the victim.

A. I'm sorry, I didn't hear you.

Q. I'm shifting our focus back to the personal injury claim of the victim, as opposed to these other causes of action.

Is there a component -- an element of causation that is a part of the plaintiff's case on the strict liability or

failure to warn or other personal injury claims of the victim?
A. Yes, you have to prove liability, which is the cause of action, as I said, and you have to prove causation to a particular trial defendant you're pursuing your case against.
Q. And what is the applicable standard under California law for satisfying a causation element?
A. To explain that, I have to explain the nature of the disease.

In mesothelioma it's well understood that -- by all experts, that the more exposure you have, the greater your risk to get the disease. If you have one day's exposure, you still have a risk of getting the disease. But if you have 30 years, you have a greater risk of getting the disease.

But nobody knows exactly the mechanism of how the disease is caused. We know that it starts in the pleura -- most of them start in the pleura. We know fibers get to the pleura.

But you don't know if somebody had -- if a fiber in July 14, 1972 was a triggering -- a cause of that mesothelioma starting to develop, or if it was helpful with another one in September of '78. So nobody knows that mechanism.

So the courts in California and other jurisdictions, have created our -- the causation proof that we have to give, it's -- all the plaintiffs have to do in California, is prove that the defendant's product, asbestos from the defendant's product increased one's risk of getting mesothelioma. No

cause. You don't have to prove cause. Just that it increased one's risk. That's a *Rutherford* case, a California Supreme Court case.

So that's pretty easy to do in trial because, obviously, the more you're exposed, the more likely you are to get mesothelioma. So any additional exposures, increases one's risk.

And that's -- so -- once we proved exposure, that's -- that's the only test we have to prove then, that that just increased the risk and doctors routinely testify, of course, that exposure increased one's risk to get the mesothelioma.

Q. And in arguing about that element, do the defendants have the scope to maintain that exposures for which their products were responsible, were trivial or de minimis?

A. They can. Of course almost every defendant does today, try to put forth that theory.

Q. So it would be nontrivial increases in the risk that would satisfy the component of causation in the cause of action?

A. Yeah, and defendants would argue many times juries find trivial risk increases the risk. Because any -- any exposure increases the risk.

Q. That issue's left to the jury?

MR. SANDERS: Your Honor, we would like to object. He seems to be offering expert testimony. It seems to be in

the nature of the testimony that's been offered before in this case as an expert. Of course he's not been tendered as an expert. He's not filed a report. We would like to object.

THE COURT: Will sustain the objection to any expert testimony.

BY MR. SWETT:

Q. In your particular practice in mesothelioma -- in trying to resolve mesothelioma cases, what defenses have commonly been asserted by the defendants?

A. Right now for the past number of years, the same defenses are put forth by almost every single defendant we try a case against. This has been true on all but one case recently, and that is:

One, our product does not cause -- does not emit any asbestos. Two, our product is encapsulated; three, our product is chrysotile only, and chrysotile doesn't cause mesothelioma; four, it's exposures to everybody else's products that caused this disease, not ours.

Those are the -- always the same defenses that we face today.

Q. Is it common for defendants to challenge the product identification evidence of the plaintiff, in your experience?

A. That's the most fruitful -- that's where the cases are really won and lost. Those other defenses, they just don't fly anymore. The whole case comes down to, is there product

identification, is there exposure from that defendant's product.

Q. In your trial practice when confronted with a chrysotile defense, how do you deal with that in front of the jury?

A. That's an easy defense now. That's a defense I have not seen be successful for years and years and years. There was some success by defendants in trying the chrysotile case back in the '80s. I don't think we've lost one since the '80s on the chrysotile theory. But it's not a theory that juries accept. And let me explain why.

Q. Let me first tell you the court has heard many days of testimony on the science surrounding the chrysotile and low-dose themes, so I don't propose to take you in any depth into those, but I would like you to explain to the court how you -- how you contest, how you challenge that defense in front of the jury in the cases that you had.

A. It's very simple.

First of all, preliminarily, the court's heard this, I'm not going to go into it. But we prove that:

One, 95 percent of all the asbestos used in the United States is chrysotile; two, there are many articles out there that say most mesos are caused by chrysotile; three, that we show that all the animal experiments show that chrysotile caused mesothelioma; four, we show that animals that were in chrysotile only exposure got meso themselves; five, we show

that the autopsies of individuals who had mesothelioma, were opened up and many of them had only chrysotile fibers in the lung and the pleura; six, we show that the studies have shown that in the pleura where the mesothelioma starts, there are 30 times more chrysotile fibers than amosite fibers, and that most experts believe the fiber has to get to the pleura to cause the disease.

Then we show also there are plenty of case studies that show chrysotile only people getting mesothelioma. There are epidemiological studies showing chrysotile only exposed individuals getting mesothelioma.

But the key here and what we do and what the jury believes is, we say to the jury, that every single -- and we show this. Every single blue-ribbon panel that's ever been commissioned. And every governmental -- every government that's searched on this where they've gotten the best scientists, and the best medical doctors, 30, 40, sometimes 50 of them together have studied and read every single article in the literature. Some of these reports took nine months, some of these reports took 18 months, have unanimously concluded -- I think there are 16 of them, that chrysotile causes mesothelioma and that there is no safe level.

MR. SANDERS: Same objection to the expert testimony.

THE COURT: Sustained.

BY MR. SWETT:
Q. Does the question of tremolite come up?
A. Yeah.
Q. I'm speaking now in the prosecution of your cases and the meeting of the defenses that are better productive to your client claims?
A. And I'm trying to explain what we tell the jury and what the jury believes, and that comes up. But what the jury actually believes --
Q. Explain what tremolite --
A. Tremolite in almost all asbestos is -- chrysotile asbestos is contaminated with tremolite, which is an amphibole.

But you wanted -- I don't know if you want me to finish on what we tell the jury on the articles. Because that's the key thing here, is, what the jury feels in these cases. Is the fact that they come out and we talk to them afterwards, the juries and they say --

THE COURT: Sustain the objection to what juries say.

THE WITNESS: Okay. I'm sorry. Okay.

BY MR. SWETT:
Q. Do you generally take a similar approach with regard to the low-dose defense?
A. Yes.

Q. Now, in California, how does the issue of the extent of the responsibility of a tort defendant found liable by the jury get worked out? What's the regime with respect to allocation of liability?
A. In California, once we prove that there was exposure to the defendant's product, and that increased their risk, and the product failed to perform as safe as an ordinary consumer would expect, there is joint and several liability unless the defendant meets its burden of proof of proving all elements of a cause of action against another entity. And if so, then the jury can apportion liability to that other entity. If they can't prove that, the jury has to apportion 100 percent to the trial defendant.
Q. Does that apply to economic damages?
A. No, economic damages are joint and several. There's no apportionment to economic damages. So that a trial defendant has to pay for the economic damages.
Q. Now, does the defendant have a burden to meet, in your experience, in arguing that a certain third person should be put on the verdict sheet and made available to the jury for apportionment?
A. Yes.
Q. What burden is that?
A. They have to have -- they have basically the same burden the plaintiff has against that defendant. They have to prove

all elements of cause of action.

That is, they have to prove negligence, if it's not a product manufacturer, or consumer expectations, exposure, causation, everything, all the way down the line.

Q. On top of that, does the defendant seeking apportionment, bear any other burden with respect to guiding the jury as to a rational way of dividing liability?

A. Yes, the additional burden -- and it was approved in the *Sparks* case. *Sparks* versus Owens Illinois, appellate court case in California -- is -- since they have the burden of proof, they also have the burden of proving to the jury a means to apportion liability.

And if they -- the jury can't apportion liability, then even though the jury finds that many other products -- that all the elements of the cause of action, all the other entities were proven, and those other entities increased their risk -- the plaintiff's risk of getting disease, if there's no -- if they can't apportion -- figure out the percentages for those defendants, then the trial defendant is given 100 percent. And that's happened on several of our cases.

Q. Is that the situation in *Sparks*?

A. That was the situation in *Sparks*. That was a case where there were lots of other products that were evidenced that caused this disease, but the jury could not figure out whether or not to give Owens Corning Fiberglass, 10 percent or

15 percent, or what the scope was, how to divide it up.

And so the court said, that's the burden of proof of the defendant, they haven't done that. Owens Illinois, which is the trial defendant, even though it was a small part, Owens Illinois was probably less than 10 percent of the total exposure in that case, has to pay 100 percent of the damages.

Q. Have you ever seen a defendant in many of your cases try to get a third person on the verdict form by presenting the court with a bankruptcy ballot on behalf -- cast on behalf of the plaintiff, against a bankrupt entity, one that they're trying to get on the form?

A. I don't remember any. It's possible. That alone would never get them on the ballot, though.

Q. Why not? You said the ballot, you mean the verdict sheet?

A. I mean on the verdict form -- on the verdict sheet. Because that's not -- that wouldn't prove all elements of a cause of action. They have to prove all elements of a cause of action.

Q. Now, am I correct sir, that trust claims -- trust claims materials and the supporting materials, submitted to the trusts on behalf of claimants, have been discoverable in California at least since the mid-2000s?

A. Correct.

Q. That's according to appellate decisions of that state?

A. Yes.
Q. In your experience, has a trust claim, the claim form itself, been a sufficient basis for a defendant to successfully argue that a bankrupt entity should be placed on the verdict sheet?
A. It is not.
Q. Why not?
A. That is not proof of all the elements of the cause of action. And they have to prove all elements of the cause of action.
Q. So in arguing for the addition of an entity to the verdict form, they have some kind of prima facie burden to meet?
A. Same as we would against them.
Q. And then when it comes to the ultimate findings of the jury, the defendant continues to bear burden in that regard?
A. It does, and it bears additional burden of trying to prove the percentages to each of those entities.
Q. I would like to ask you, there's been a lot of talk in our case about asbestosis litigation in the 1990s, compared to asbestos litigation in the 2000s. Focusing on your own experience, can you explain to the court, compare for the court the types of cases you were getting in the '80s and '90s, and the types of cases you were getting in the 2000s?
A. Yes. In the '80s and early '90s, to the mid-'90s, we had

a lot of insulator cases, people who were insulators, who actually were using the products every day, all day long. We had a lot of career shipyard workers.

Now a career shipyard worker is somebody who works -- goes every day to work in the shipyard, and works either repairing the ships or constructing the ships, and is down in engine rooms or boiler rooms around the insulation being put on or ripped off or repaired and put back on. And they do that for 20 years, 30 years, whatever their career is. Those are the primary cases we had, by far the vast majority of cases we had were career shipyard worker cases and insulator cases.

That has changed, and the reason -- and everybody knew that was going to change, because there is a pretty general -- recognition by experts is that the heavier the exposure, the more intense the exposure --

MR. SANDERS: Again, object to the expert testimony.

THE COURT: Sustained to what expert says.

THE WITNESS: Okay. That has changed because those people all died off. Their exposures were so great they died off. And so we don't get career shipyard workers anymore. Very seldom do I get a career shipyard -- once in a while.

MR. SANDERS: This is expert testimony also.

MR. SWETT: No, Your Honor.

THE COURT: We'll let him testify about that.

THE WITNESS: So very seldom do I get career shipyard workers anymore, once in a while. I very seldom get insulators. Now we get people whose exposures were not near as intense, not near as much.

We get a lot now more Navy people. Navy individuals are people who serve in the Navy and are on board ship, most of the time, at sea. There are very few repairs going on at sea. The only repairs going on are to the valves and pumps and gaskets, but they don't do insulation work at sea, with very rare exceptions.

And about every two years a ship may come into a shipyard for a repair, three-week repair, two-week, a month-repair. And then every so often, I don't know if it's every five years, they come in for a two-month repair.

So if somebody's serving in the Navy for four years, they might come into a shipyard once or twice during that period of time. And some of the time they would take leave and be -- and a lot of time they would be on the ship the entire time it was in the shipyard.

They would be exposed when they are in the shipyard to repairs going on. And they would be exposed, if they worked in the engine and boiler rooms to the pump and valve and gasket exposure at sea. We have a lot of those cases now.

We have a lot of land-based exposures these days --

Q. Before we leave that, I would like to just clarify that,

get you to clarify the difference in your experience between the shipyard, career shipyards from exposures and the Navy exposures.

A. Well, the career shipyard person is onboard ship every single day, repairs are going on every single day of his career. He's in very, very heavy exposure to asbestos.

The Navy, as I said, may come into port two, three times, one time, who knows how many times. And if they were four years, if they were career Navy person, longer than that, more times than that. And they would be for minor repairs sometimes, sometimes major repairs, so the exposure would be a lot less.

Q. You were about to talk about a different kind of case, what's that?

A. Now we have a lot more land-based exposures. Plumbers, steamfitters, we have auto mechanics, we have a lot of people in very unique exposures.

I tried a case -- we tried a case where somebody's only exposure was -- that we could prove -- was walking up and down the stairs of the home that was coated with this mastic material that had asbestos in it.

So we have unique -- we have more unique exposures today. But primarily land-based and Navy exposures are the predominant. There are still some shipyard ones once in a while.

Q. Now what impact has that had on your work when it comes to product identification?

A. Much, much more difficult today. Back when we had the insulators, the insulators all knew their products. They worked with them every day. So they knew what products they were exposed to. They could identify them. That made it much easier to prove whose products they were exposed to.

Some of the career shipyard workers also knew, because they would be working in a shipyard for 20 years. They would go in the store room. They would stop -- so some of those people also would be able to identify the boxes of the products they saw.

Today, we don't have that, because the Navy person is not handling the asbestos or seeing it, so they don't know what asbestos is being used.

The land-based, other than, you know, if you worked directly with a product. Like if you work -- if you're a plumber and you worked directly with a gasket that has stamped "Garlock" on it or something, you can remember that.

But if somebody is using an asbestos product that you're exposed to, 15 feet away, you don't know what it is, because there's no box there. So today, it's much more difficult to prove product ID. You normally don't get it from your client.

So we have a whole department in our firm that -- with lots of people working on it, trying to find the product ID.

Because I get a client in -- excuse me -- and who says, I was exposed, and, you know, we proved there was exposure 40 years ago. He doesn't know who he was exposed to, or 30 years ago. We have to go and we have to find where he was exposed and to what products. And we have to do that from scratch.

Q. In your experience, do the defendants now face the same problem?

A. They face exactly the same problem we do.

Q. Working still with the comparison between the 1990s and the 2000s, explain to us please how, if all, Garlock's presence and role in the tort litigation has changed.

A. It's changed dramatically.

Q. How so?

A. In the 1980s, as I said, we had insulator -- and 1990s insulator and career shipyard workers. There were a lot of defendants in the litigation. A lot of insulation defendants in the litigation. The primary exposures to those people were from the insulation products. They were from the block and the pipe covering.

All of those defendants who manufactured -- or almost all of them, there were a few exceptions, Johns-Manville went bankrupt in 1982, were in the tort system and were paying money.

And so, if you had a career shipyard worker or insulator you could get most of the value of the case against the

insulation defendants and you didn't have to deal with some of the other defendants, the contractors, the distributors, the sellers and others. So that slowly but surely changed.

And as the cases changed, and as the defendants also went into bankruptcy, then you had to start focusing on others who were responsible, and were always responsible, even in the '80s and '90s, but you hadn't focused on. And so as the times went on, others became bigger.

Now Garlock especially became much bigger for several reasons. One is, it's always easy to identify Garlock. PID, as I said, product identification is the key to all these cases. Garlock is one of the easiest defendants -- this has been admitted by Garlock's attorneys -- to identify, because there were a ubiquitous gasket company, and they had their name stamped on every gasket. So anybody who's worked around gaskets, remembered Garlock. So you had ID for them.

No longer you had as much ID as I explained before on other defendants. So that's one thing as cases, it got easier.

Secondly, as I said, the exposures changed. Garlock -- the exposure to a gasket became much more significant for -- to a Navy personnel than a career shipyard worker. Because a Navy, you have a machinist, a pipefitter, a boiler tender, many other things. They were actually handling, personally handling the gasket. They were taking and scraping it out

with a wire brush and creating dust. And they would testify about the dust that they were inhaling from that gasket.

We couldn't prove, even though we knew Navy people, that there was -- that there was asbestos being used, perhaps 30 feet away from them, or 20 feet away from them, we couldn't prove whose asbestos there was. So there's no apportionment there. There's no liability to those people. You can't prove that. So Garlock's role became much greater in the percentage of liability.

Secondly, the latency in the cases is key. In 1972, the insulation defendants stopped making asbestos insulation in pipe covering and block. It was outlawed by OSHA. So Garlock continued to make gaskets all the way in 2000 -- asbestos gaskets until 2000, 2001.

So after 1972 it was really difficult to pin, many times, liability on insulation manufacturers. Because nobody was putting on new asbestos. And even though they may be -- for a few years they may be in ships where asbestos or places where asbestos was being ripped out, it's impossible to prove what asbestos is being ripped out, almost impossible. Once in a while you can, but very seldom can you, because you have no idea. There's no product name. So all those exposures went away.

Q. Let me ask you a question. You said after 1972. Are you speaking of the onset of disease after 1972, or are you

speaking of exposures after 1972?

A. Exposures after 1972.

There were several other reasons besides that. One was, it was much easier to prove causation against Garlock once *Rutherford* came out, which said -- *Rutherford* is the case that says, every defendant is liable if they increase the risk. Only increase the risk, that's a much easier standard to prove, rather than trying to prove some type of causation.

And there's been certain case law that's been changed that has made Garlock a much bigger defendant in California than they were in the law.

Q. What changes in the law are you referring to?

A. The first one is Taylor, in the Taylor case, the ruling was that you could no longer get an equipment manufacturer, stick them liable for any product in their equipment that they didn't provide.

So you have pumps, you have compressors, you have refrigeration, you have all sorts of these machines that have gaskets inside of them. They were sued on behalf -- these gaskets had to be replaced on a regular basis, so people go in, scrape the gasket out, have to replace it.

They used to pay and we used to prove they were Garlock gaskets in those -- in those --

MR. SANDERS: Your Honor, we object him giving opinions about legal trends. It sounds again like expert

testimony.

MR. SWETT: Your Honor --

THE COURT: I'll let him go ahead.

BY MR. SWETT:

Q. Please proceed.

A. This is what happened in our practice.

So we used to sue those equipment and pump manufacturers, and they would pay on the basis of having Garlock gaskets in them.

MR. SANDERS: Your Honor, it's expert testimony. We didn't get a report. He is a surprise witness. I mean, he's being tendered -- it seems like he's been tendered -- he was a surprise fact witness, and now he's a surprise expert witness.

THE COURT: We'll let him proceed on this line.

THE WITNESS: We would settle with all the pump and valve and compressor manufacturers on the basis that Garlock gaskets were inside these equipment, and they would have to be replaced on a consistent basis. And they would pay. I would sometimes get well over a million dollars -- well over a million dollars in a case from pump and compressor and other equipment manufacturers on the basis of that.

Once in a while some of these equipment were insulated. But a lot of times, none of this equipment was insulated. So they would only be paid on the basis of the Garlock -- the Garlock gasket inside them. Then I would also

sue Garlock.

Well, once *O'Neil* came out.

BY MR. SWETT:

Q. You were speaking of Taylor first.

A. Taylor -- once Taylor came out, I no longer could get -- if -- let's say in a case I got between Garlock and the pump and compressor and equipment operators a million five, I would take 250,000 or 350,000 from Garlock, the rest would be made up by the pump and the equipment manufacturers.

No longer were they going to pay that share. That share then now has to go to Garlock, because Garlock was the gasket that we had identified.

So -- and they couldn't put and point the finger and apportion the liability to those equipment manufacturers anymore, because they were, by law, immune, except for the very first gasket. And we could get them -- if we could prove it was the very first repair, but that was almost impossible to prove. Because the very first gasket that came with equipment that they put on. Other than that, the replacement gaskets you were prohibited from attaching liability to them for.

So that dramatically upped Garlock's liability.

Q. What's the relationship to that of the O'Neil case?

A. The O'Neil was just a further case. Taylor was 2009, February, 2009. O'Neil just affirmed that theory, but it was

in fact in California since 2009.

Another law change was really big and that's the Campbell case.

Q. What's that?

A. Campbell was -- is a case that said in household exposures, those are exposures to where it's the wife or children who get the disease, because the asbestos dust is brought home by the worker, and it's contaminating the car, or you do the laundry, or it's in the house, or the kid sits on the father's lap. Those are really a lot more predominant cases today. We're getting a lot more of those cases. We used to sue the premises owner of where the father worked or the husband worked, the contractors, the manufacturers, the employer, were all liable defendants.

Campbell has now said, you can only sue the manufacturers of the products, the sellers of the products, and the employer. You can't sue the premises, the subcontractors and all.

So all of a sudden now you have many fewer defendants divide up the same liability. And the defendants were left can't apportion liability to any of those. So each of those defendants, especially the product manufacturer's share of responsibility has gone up dramatically, hugely.

And Garlock, being a very commonly identified defendant, share of those cases has gone up hugely.

Q. Now, when you were resolving cases against Garlock in the 1990s, were you looking to Garlock to pay what you consider to be its full fair share of the liability?
A. There were many defendants like that that we did not do that to, no.
Q. Why not?
A. Garlock was one of a whole bunch of defendants that didn't pay their fair share.
Q. Why not?
A. We had started suing the major insulation defendants and worked those cases up. We had those cases in the book. Those were easy cases for us. We knew all the liability, for the most part. And if we had exposures where there was dominant insulation products, we knew we could get the money from those defendants. And so we took the defendant -- we took that money.

There were a lot of defendants who early years skated -- played -- there were the contractors, the local contractors and distributors and sellers, there were the boiler companies. There were the equipment companies, there were the gasket companies. There were a lots of defendants that didn't pay, perhaps what they should have paid back, because we had enough other defendants paying enough money to get the value of the case.

Q. Was that true in the 2000s? At any point in the 2000s

was that true?
A. It changed dramatically, obviously, with the change of the cases. The cases -- the nature of the case changed. In the early years, you never got any money from the brake defendants, even though we know there was brake work. Now brake defendants are huge. Gasket defendants are huge. Boiler companies were huge until they went bankrupt, and before you'd take $1,000 from boiler companies. In the end they were paying 800-, 900,000 a case. The contractors, local contractors where you didn't sue them or took very little money then, were paying sometimes millions, because of the identification, because of the change in cases, because it changed the defendants.
Q. Now over the course of the '90s and the 2000s in your interactions with Garlock in the resolution of cases, was there a general trend with regard to increase or decrease in the values in which you were able to settle your cases?
A. Yes.
Q. What was that trend as far as Garlock's involvement is concerned?
A. A consistent increase.
Q. When you were negotiating those resolutions in the midst of that trend, what factors did you point to in negotiations to justify increased demands?
A. Discussions I had with Garlock's counsel.

Q. Well, we can break it down and just go step by step.
A. Regarding why. First thing was that their defenses were no longer viable. The chrysotile defense was shot down.

Initially they had this defense of encapsulation, and that there was no asbestos being emitted of work from gaskets and they had their experts. And that was a scary defense until we got into it, until we had studies, until we took a lot of depositions of people who remembered dust coming from their product.

Rutherford changed that also, the fact that we only had to prove increased risk. There was in fact the changing type of cases we talked about, that they were a much bigger player with the current cases than they were with the older cases.

There was the fact, the change of law that we've talked about. They became much bigger player because of who we could sue and who we couldn't sue.

There was a change in the fact that you couldn't identify insulation exposures anymore or the products of those insulations, because they were ripped out, and all that stuff. So they couldn't blame other insulators, and a lot of people weren't exposed as much to insulation anymore.

There was -- the fact that -- I guess I'm sure there were other factors that we discussed.

Q. How about general developments in your jurisdiction with regard to the behavior of juries?

A. When I first started trying cases in the '80s, jurors had reaction of why are we going to hold somebody responsible for something 40 years ago. And they didn't like strict liability --

THE COURT: I'll sustain objection to what juries do, seems to me that's total hearsay.

MR. SWETT: Your Honor, I meant to focus him on what arguments he would make in negotiations to justify higher demands.

THE COURT: As long as he sticks to that, that is all right.

THE WITNESS: These are exactly what I would discuss with David Glaspy, who was Garlock's counsel that I dealt with mostly.

The fact that, initially, almost all defendants won their cases, even Johns-Manville, Owens Corning, the railroad, everybody won their initial cases, majority of the defendants. And it took plaintiffs awhile before we could understand how to present a case to the jury to show that this poison caused this disease.

And the same was true with Garlock and that the jurors' attitudes -- and I told Mr. Glaspy this -- changed and he acknowledged that now jurors were much more --

THE COURT: Sustain the objection to what jurors do.

THE WITNESS: Okay.

THE COURT: You want to testify about that, you can go out in the hallway --

THE WITNESS: Okay.

THE COURT: In here we're going to keep it to what you did and said.

THE WITNESS: Okay. I'm saying, these are the things I said, excuse me, Your Honor, to David Glaspy himself.

And I would say that -- and he would acknowledge, that it was much easier to win an asbestos case today, than it was in the '80s and even early '90s and '90s, because the jurors were much more receptive to these cases.

And the values have gone up dramatically. The values of the settlements and the verdicts rose dramatically from the '90s to the 2000s, and that made each case more valuable.

BY MR. SWETT:

Q. Let me shift gears and direct your attention to the process of suit, as it involves your prosecution of mesothelioma claims against Garlock and similar defendants.

Mr. McClain, when you -- in the '90s, the 2000s, throughout your asbestos practice, when you file -- when you file a complaint, do you get to have complete knowledge with respect to the exposures actually sustained by your client in regard to asbestos products?

A. No.

Q. How then do you determine what companies to place on the complaint as defendants?

A. You take an extensive interview of the client. Many times a client has no idea that he was even exposed to asbestos.

I had one client that doctors diagnosed with mesothelioma. The first 11 times the doctors asked him, was he ever exposed to asbestos, he said no. So we have to, sometimes they know -- we find out where they worked. We find out what type of job they did.

Most of them -- most of my clients don't remember many products names, don't know whether it was asbestos or not. Then we have to start the investigation.

If it's a job site that we've investigated -- if somebody comes into my office and says, oh, I worked at Mare Island Naval Shipyard, I've had a lot of cases. I know right away who the viable defendants are in those cases. If somebody comes in and says I've worked down the street here, we've never seen that. We have to go look and find what products were there, and sometimes it's 40, 50 years ago. As I said, it's a tremendous amount of work.

So what we do when we file a case is, if we generally say, well, he was a plumber. Okay. Because my client's dying -- and they die very fast. In California, if there's somebody's dying, you get a trial date within four months. By

law, they have to give you trial date within four months.

And -- so you have to name everybody possible right at the beginning, because you can't go back in and bring somebody in, you lose your trial date. And you can't, because your client will die.

So what we do is, we look at the nature of the total -- the exposure we think he may have had, and we name everybody possible that we think that might be responsible. And then we start the investigation and work to see who actually was the manufacturers' of the products -- that manufactured the products where that person worked.

Q. Is that common and accepted practice in asbestos litigation in your experience?

A. Yes, it is. And sometimes we miss -- sometimes we'll find somebody later on in the case, even after the case is over, but we can't bring them in. We have to wait for the wrongful death.

And obviously in every single case we will find that some of the people we named had nothing to do with the case and we would dismiss them.

Q. What sort of discovery did Garlock serve on you in the defense of your cases?

A. In California, in Alameda County, there's a joint defense set of interrogatories that ask plaintiffs to -- very complete -- to fill out all the different facts relevant to

the case. We have to verify every single exposure the plaintiff had. We have to put all that information in. We have to put in all the medical history of the plaintiff. We have to put all the background in. We have to prove all the damages, everything else. That's served on behalf of all defendants, Garlock and everybody else. We have to fill that out.

After that, individual defendants can propound additional discovery. The deposition of my client is taken. Today the deposition of my clients lasts weeks on average. And they depose -- and that's -- we usually are one day and the defendants go --

Q. What do you mean, we usually are one day?

A. We usually do direct, because we don't know whether our client will be able to testify at trial, because he could be too sick or dead. So we videotape it and do a direct examination. And then the defendants cross examine. Ours usually take a day or less, and the defendants usually take several weeks. They go into every single detail of my client's history and background and exposure. That's done on behalf of all the defendants.

Other defendants then can propound individual interrogatories, and they do. And then the defendants can notice depositions of my experts and all the PI -- the witnesses, economic witnesses, the product identification

witnesses, and Garlock is part of the deposition. Garlock is part of the joint defense interrogatories. And usually Garlock did not actively engage in a lot of other individual discovery in my experience.

Q. There's been testimony from one or more Garlock witnesses that Garlock's track record at trials, win/loss rate in the 1990s is a fair indication of the real extent -- or in their view -- the very low amount of their liability, if any, for mesothelioma cases.

As you think back to your own experience in the 1990s, do you think that's a reasonable interpretation?

A. No.

Q. Why not?

A. Several reasons. As I said --

MR. SANDERS: Object to the expert opinion.

THE COURT: He can testify about his own experience.

MR. SANDERS: Right. He can talk about his verdict history with Garlock. But he seems to be offering an opinion about what that means.

THE COURT: I'll sustain the objection to his opinions.

MR. SWETT: Your Honor, this is intended to be directly responsive to Mr. Magee's testimony and Mr. Magee is not an expert. This man was deeply involved in cases against Garlock.

THE COURT: He can testify about the facts of those involvements with Garlock.

MR. SWETT: Okay. We'll take it right down to that level.

Q. According to Garlock's summary of its verdicts, your own record, or that of your firm at trial against Garlock in the 1990s was something like six and 0. They won six, you won none.

Give the judge your perspective on that record and what it means and what it doesn't mean.

A. That's true, but you have to understand what was going on in those cases. Those were mostly -- with a couple exceptions I'll talk about -- but all the beginning ones were the OCF war cases.

We were after OCF. We wanted to -- OCF was trying cases against them. All the first verdicts were OCF cases. OCF was the only defendant left, except for Garlock. We purposely left Garlock in those cases, for two reasons -- for actually more than two reasons, but two main reasons.

One is, we liked the way Garlock defended the cases. Garlock would bring experts in that would say the same thing our experts would; that OCF and the insulation was dangerous, was lots of dust, and was the cause of this mesothelioma.

So we had our focus on OCF and we had Garlock's focus on OCF, and that really helped us in winning those cases.

Second thing is, OCF would remove the cases to federal court if they were the only -- if they were the only defendant left. And they were going to be the only defendant left other than Garlock.

We knew Garlock had a position that they didn't want to go to federal court. They liked being in state court. So they would refuse removal.

To remove a case to federal court, you had to have consent of all defendants left in the case. Garlock -- OCF kept trying to get Garlock consent to remove. Garlock wouldn't consent to remove.

So by keeping Garlock in, we could stay in state court. State court was a thousand times better jurisdiction than federal court. Because federal court, at one point you went to MDL and never got a trial date and your client would die.

And so -- and these were cases that were career shipyard workers, or heavily exposed to insulation cases. And so we weren't focused -- they weren't people who worked with gaskets. So we weren't focused on the gasket exposure. Although there was some gasket exposure, because just being in the engine room, there will be some gasket work going on, even though they didn't do it themselves.

Q. Let me ask you this. Did you have product identification against Garlock in each of the cases you had against them in the 1990s?

A. You had Garlock identification in almost every case in that type of setting, yes. We had that, and we had a prima facia case. But we weren't interested in Garlock, we were interested in OCF.

And the fact is, my experience, as I said earlier, is that every defendant, no matter who they are, wins most of the initial cases they try, and then it changes.

And the Garlock -- but those cases were not fair tests of our liability. Every case that we had a decent Garlock claim on, Garlock would settle those cases. They didn't want me to go to trial against them.

Q. How many cases against Garlock have you -- can you estimate for the judge, how many Garlock cases have you settled over the years?

A. Hundreds, hundreds.

Q. I want to bring you back to --

A. I didn't finish. I said all OCF -- there was a case I tried, the Plooy case, which was not an OCF case. But that was a Johns-Manville plant worker's case that I kept Garlock in for the same reasons. There was ID, but my client was a Johns-Manville plant worker. He spent all day every day dumping bags of crocidolite and amosite bags, and there was a couple of Garlock repairs he didn't do that, but somebody else did. I kept them in that case, because they also would not consent to removal.

And that was another case, although that case at the very end they did -- we settled right before closing argument because they couldn't remove at that point, and that actually settled that case.

Q. What sorts of working relationship did you have with Mr. Glaspy?

A. Very good. A very good working relationship.

Q. How did you all go about resolving cases?

A. I went about resolving cases with Mr. Glaspy as I did with every other defendant attorney.

The first thing you do, when you sit down and discuss settlement, you talk about every individual case. I would send them the facts or analysis first of what we thought the case was about, the exposures, where there was high value or not.

And then you talk about what is this -- what's the value of this case in the tort system. Then you talk about what share Garlock has in this case, compared to the share of any other defendant in the case. Who -- you know, are you -- are you a big player; are you a small player; where do you fit.

Who -- and when Mr. Glaspy will say, well, these other people should pay the vast majority of the case -- of the value of the case. I should only pay "X". I would say, well, you can't prove any liability on them. You can't prove liability on them. So we would discuss Garlock's share.

And then when you get to the -- then you talk reasonable settlement range, because you're not going to settle for verdict value, you have to discount. And then you talk about each individual case that way and you come to a number.

Q. There was evidence presented yesterday of some assessments by Garrison people of groups of cases that were proposed to be settled with you, and they expressed views in this -- in these documents as to the magnitude of the potential verdicts. And this was in the context of advising with respect to particular settlements in which the total dollars that were recommended and ultimately approved and I gather accepted, were much, much less than the total -- than the total amount of potential verdict as assessed or evaluated by -- at least the risk -- the total amount of verdict as assessed by Garrison people.

Can you explain to the judge why a lawyer in your position acting for claimants against Garlock, would accept significant discounts from the potential verdict value of the case?

A. There are many reasons for that. There's no question, trying every case against Garlock, we would have received orders of magnitude more than we took from them in settlements. No question. That would be true for almost all defendants.

But you have an individual client who you're

representing. And there's no question that you can lose -- you're going to lose some of the cases. You're not going to win every single case.

And so one client you're going -- is going to hit the lottery, and many will hit the lottery and some may get zero, not that many, but some get zero.

Also you look at the -- if I have a case and I think it's worth $15 million in settlement value and I can get that from all defendants, some of my clients, we talk about that, they say, if everything is fair, if everybody is taking their fair share, we get to that money, that's enough. I don't need to go to trial.

So -- and, you know, you never go for what you're going to ring the bell for. If you get greedy, you lose. And so if it's within the realm at that time, considering all the other defendants who are paying, how many other defendants there are, you settle. And so sometimes you settle, yes, for a lot less than the case you could get at trial, but it's a reasonable settlement.

Q. Is there any sort of rhythm or pace at which you settle cases against Garlock?

A. Garlock, except for the cases we needed them in trial, would basically agree with us to settle in groups. So we would wait. We would wait and accumulate enough cases. They wouldn't participate in trials, and we would wait and

accumulate a group of cases, and we would sit down and discuss a group of cases, sometimes once a year, sometimes once every two years, and we would settle groups at a time.

And a lot of times we would settle cases that we had already tried, had already been resolved, totally resolved, because there would be two or three years later than when a case was filed.

Q. Now, the courtroom is open today, we haven't closed it for confidentiality reasons, so I will avoid discussion of specific numbers or values. But I want to get back to the trend in your resolutions with Garlock over the course of the 2000s, keying off of the 1990s.

Can you give the court, as specific explanation as you can without getting into the numbers, of what that trend was?

A. A dramatic increase. Initially Garlock was -- these numbers are probably -- since they're in bankruptcy, not disclosable. But Garlock was paying very little monies, initially in the insulation cases. They wound up paying 80 times -- no, not 80 times -- 800 times or more the numbers they were paying. On average the numbers went up -- you know, 300 times -- would have gone up -- we were negotiating a group in 2009, that I know what the numbers would have been to settle that group. They would have had to settle because we had incredible Garlock cases we could have killed them on each. And that would have been over -- that would have been

about 700 times or more than that 700 -- maybe 1,000 times what they were initially settling for in the '80s, on average.

Q. Now, did trust payments to your clients have an impact on your demands upon Garlock in the resolution of cases?

A. I can't say trust payments did not. The fact that a lot of companies were no longer in the tort system and could not be identified had a dramatic effect.

Q. Why was that --

A. Because they were no longer there, no longer paying any monies, they couldn't be identified or apportioned to, Garlock's role was much bigger.

But the trust payments themselves are insignificant compared to our settlements payments in the tort system, with the one exception when you have a big Western MacArthur case, that could be a little bit, still not significant compared to the total value. It's an insignificant amount of percentage.

Q. Your firm submits trust claims?

A. We do.

Q. Explain to the court the process by which you prepare trust claims?

A. Because most of our cases are dying cases, and we are racing the grim reaper to get our case tried before our client dies. In California, if you don't get a case tried while someone is alive, they lose their pain and suffering damages. So that the decrease in value is significant. So you have to

try to get that case tried before he dies or she dies.

We focus all of our efforts in working the case up against the tort defendants. We answer interrogatories where we have to disclose every single exposure, no matter what. But all our efforts are trying to identify it -- it's very difficult today -- to identity whose products it were that our clients were exposed to. That's what we are focused on when we are trying our case.

Once that case is resolved or tried, then we take that information that we have found, and we see which trusts we think we can claim against. And we submit the answers to interrogatories that were mandated there, that show every exposure to the trust. And we usually find that there are not that very much trusts we can submit claims to.

Q. When you say that the interrogatory answers have to list every single exposure, will you explain that further, please?

A. Yeah. We have to verify that we have put forth every known exposure to asbestos that our client had. And our client has to verify that and we have to. So that's mandated by Alameda County orders.

Q. In your experience, sir, are your clients forthcoming in discovery?

A. Yes. The only thing -- what we tell every single one of our clients. Our clients are innocent people who are poisoned and dying because of the conduct of defendants who knew about

that dangers since the 1930s.

With the facts and law are on our side, the only thing we tell our clients is, the only way you're going to lose your case is if you're not honest. That's the only way you will lose your case, otherwise you will win. I have not found clients to be dishonest in the slightest or hold back anything that they know of. That just does not happen.

I think our clients today know a lot less than our clients did in the '80s and early '90s because of the nature of their exposure and what products they were using. But none of them are saying anything that is not fully truthful.

Q. Mr. McClain, in your present experience, are the California courts still fully open and available to asbestos victims?

A. Yes, in fact the presiding judge, asbestos judge in Alameda County just the other day said they have more filings now in Alameda County than they ever have, since she's been doing it. I just heard that they have four trials out in San Francisco -- asbestos trials out in San Francisco at the same time.

Q. How about your own case load. Is your own case load going down or up or stable?

A. Going dramatically up. We're filing more cases now than we have in years. It's going -- California, you have to understand, is the best jurisdiction to try cases in the

United States, and everybody knows it. We're getting referrals from all over the country. If there's exposure in California, that case will go to California, because the verdict values are higher, the settlement values are higher in California. That's true of all cases.

MR. SWETT: Your Honor, I'll pass the witness.

THE COURT: All right. Mr. Sanders.

MR. SANDERS: Thank you, Your Honor.

CROSS EXAMINATION

BY MR. SANDERS:

Q. Good morning, Mr. McClain.

A. Good morning.

Q. We met Monday. So you know I'm Blaine Sanders. Good to see you again.

A. Nice to see you.

Q. Let's talk about the discovery responses. You said, I think, in your testimony, that in California you have to list every single exposure in the interrogatory responses; is that right?

A. That's true in Alameda County, that's correct. I believe that's true in almost every other county that I'm aware of.

Q. And when you're listing those exposures, you not only list the exposures that your client knows about, but you also have to list the exposures that your lawyers and your law firm knows about, these ones that you talked about uncovering, you

have to list those also, don't you?
A. We answer interrogatories based upon the attorney's knowledge and the client's knowledge.
Q. Switching gears to trust claims. When your firm files trust claims, it does so based on actual exposures, doesn't it?
A. Different than ballots and trust claims and stuff, yes.
Q. I think you said at your deposition that you filed -- you submit ballots based on potential exposures, but you submit trust claims based on actual exposures, right?
A. Based on what we feel is actual exposures. Sometimes a trust denies it and we think wrongly, but that's correct.
Q. Right. I think you said you feel in some ways -- you feel like it's a tougher standard to recover from most of the trusts than in the tort system; is that right?
A. Most. There's a few exceptions, Johns-Manville site list, OCF site list. But besides those few exceptions, we have horror stories in our office about exposures that we know we would settle in the tort system that the trusts are denying, which is very frustrating.
Q. You talked some about your firm's verdict history against Garlock. And you talked about Garlock was 6 and 0 against you in the '90s. Do you remember saying that?
A. Nineties and 2000s. Maybe it's just '90s. I know there were some cases tried in the 2000s that were similar to the

'90s.
Q. Let me -- I mean, let me list the cases. There was, you remember the Trembly case in 1988?
A. Trembly?
Q. Trembly in 1988.
A. Yes. I tried the Trembly case myself.
Q. Right. That was a zero verdict for Garlock, right?
A. I think we kept Garlock in so they wouldn't remove, that is correct. That was against the ACF, the Wellington Group of defendants and we won that case against them. And I didn't -- I didn't try to point the finger at Garlock in that case. It was not a gasket case.
Q. But Garlock -- you went to verdict against Garlock and Garlock got a defense verdict, right?
A. Yes. Garlock cooperated with us and pointed the finger at the insulation defendants and was very helpful in us getting that verdict. It was a very good relationship.
Q. And then in the '90s against Garlock, you had the Parovel case, the Buttram case, the Alfaro case, the Treadway case, the Morton case. Those were all defense verdicts for Garlock, right?
A. Those were all OCF trials. Those were the OCF wars, and I explained -- and they were very helpful in us winning those cases against OCF and we got very big verdicts against them.
Q. Right. So you got verdicts against OCF, the insulation

manufacturer. But then you got zero against Garlock, right?
A. Yes. But if we had decided that we wanted to focus on Garlock, I don't know if those would have been the same results, but we purposely did not.
Q. But the actual results were zeros against Garlock, right?
A. That's correct.
Q. And I take it that you put on evidence against Garlock in the case, right?
A. As minimal as I could to -- but to stop a directed verdict or a nonsuit.
Q. And then you asked for a verdict. You asked the jury for a verdict against Garlock in those cases, right?
A. I don't think -- no. I tried the Parovel case myself. What I told the jury if I recollect correctly is, this is an OCF. This is an OCF. This is an OCF case. This is who you should hit. You decide from the evidence what you're going to do with Garlock.

I didn't -- I could not say -- the defense is then, there would be a nonsuit or a directed verdict and then they could remove. So I left it up to the jury. I said, you heard the evidence, you decide whether or not they are at all responsible. I did not say they were responsible. That's my recollection.

Q. In the 2000s, you went -- you went to trial with Garlock in the Price case in 2006; is that right?

A. I didn't think -- I didn't do that case myself. But that was a case that we went to trial with against Chrysler. And Chrysler would remove the case to federal court. And so I suspect if you're saying that they were there, I don't remember that, but I suspect they easily -- they probably were then.
Q. And that was a zero verdict Garlock, right?
A. Unfortunately --
Q. And a zero verdict against Chrysler, right?
A. Unfortunately that was a zero verdict against everybody.
Q. All right. And then I think you mentioned the Plooy case, that was in 2008. And I think what you said was that that -- you settled at trial with Garlock for a small amount of money?
A. We settled right before opening -- closing arguments, because at that time they could -- the trial defendant could no longer remove the case.
Q. Right. I think we disagreed with you about whether there was really a settlement. But your testimony is that there was a small settlement with Garlock?
A. I'm 100 percent sure that there was a settlement but it never got paid.
Q. That was in 2008 when that case was?
A. Yes, I tried that myself.
Q. Right --

A. We got a nice big verdict against the trial defendant.
Q. Right. But if any settlement, a very small settlement against Garlock?
A. It was a small settlement against Garlock. It was a case really that Garlock had insignificant, if any, exposure compared to what his real exposures were.
Q. And in 2009 you went to verdict in the Smith case; is that right?
A. That's correct.
Q. And there was a zero verdict for Garlock in that case right?
A. No, I don't believe that's correct. I think that's wrong.
Q. And you think -- what do you think happened there?
A. Oh, there was a Mary Carter in that case at the end so they couldn't remove. And Mary Carter is that they agreed that they would pay a certain amount depending upon the outcome. And it may wind up -- I think you may be right. Because they would have had to pay if we got more than "X" amount from the jury -- award more than "X" amount from the defendant. I don't think we hit that amount. We won against the defendant, but I don't think we hit that amount. So I think it wound up being a zero case. But they didn't go to verdict because there was an agreement on what they would pay this much if it was this verdict, or that much if it was that

verdict. And I don't think we hit the threshold.
Q. But Garlock, in all these cases, I think there are nine altogether. In all these cases that your firm went to trial against Garlock, Garlock has never paid your firm a dollar based on those cases; is that right or --
A. That's wrong.
Q. -- let me say, a dollar that the jury ever awarded against Garlock; is that right?
A. Yes. Some of those case were settled into the trial or at the point where they were no longer needed, and they did not go to verdict even though they went through most of the trial.
But the ones where they did go to verdict -- no -- we -- no, you're right. We have never collected any money from Garlock in a verdict, that's correct.
Q. And your firm has never tried a case against Garlock as the sole defendant, right?
A. We have not.
Q. And you haven't -- your firm hasn't gone to verdict against any gasket manufacturer by itself?
A. I don't believe we have. I think we -- we're in trial and settled against gasket manufacturer early on. But I don't think any gasket manufacturer has ever taken us all the way to trial, and we haven't, and then we worked out an agreed upon settlement.

Q. So your verdict history about -- with Garlock that we've been talking about, that doesn't show any trial risk for Garlock, does it? Garlock's always won.
A. I would disagree. Every single case that I've had that's a good case against Garlock, Garlock would never let me try that case.
Q. But I'm talking the verdict history, the cases that you've actually gone to verdict with them, those wouldn't show any trial risk, right, because Garlock always won?
A. You come up with apples and oranges, yeah, you're right. But Garlock knew they would win those cases going in and I knew they would win the cases going in.
Q. Isn't it a reasonable conclusion, when you look at your firm's verdict history with Garlock, is that when Garlock has a defendant in the case that it can point to, like in those OCF cases as the cause of the plaintiff's disease, it wins, right?
A. No.
Q. You don't think that's a reasonable conclusion based on all those verdicts against OCF, that's in fact what happened, right? Garlock pointed at OCF in all those cases, correct?
A. Garlock pointed OCF in all those cases.
Q. And Garlock got defense verdicts in all those OCF cases, right?
A. On all those cases went to verdict, they did. But I can

explain.
Q. You've already tried to explain. I guess you can explain again, if you want. But you tried to explain it.
A. None of those were individuals that used gaskets. None of those were Garlock cases that they would have exposure.
You give me the same exact exposure to OCF with somebody who was using gaskets, and the outcome would have been very different, but our focus would have been different.
Q. That's what I want to talk to you about next, is talking about OCF and the insulation exposures disappearing from the litigation.
You remember at your deposition we talked about six Kazan cases that are on the RFA list?
A. Yes.
MR. SWETT: Excuse me. Are you going to go into details about individual cases, we have to close the courtroom.
MR. SANDERS: I understand. I tell you what my plan is. I will not mention those cases by name. I'm just going to mention trust claims that were filed in the case, but I'm not going to mention the cases by name.
MR. SWETT: Are you going into details about the claim?
MR. SANDERS: Not about the tort claims. I do intend to name who the trust claims were filed against, yes.

But not -- I'm not going to name the cases, name the plaintiffs.

MR. SWETT: Okay.

BY MR. SANDERS:

Q. You do recall those six cases that we talked about at your deposition?

A. I do.

Q. I'm looking at a printout, and this actually is an excerpt from -- do you want to hand Mr. Swett a copy of the excerpts.

This is an excerpt from Garlock Exhibit 1,600, which is a database of trust filing information from the Delaware Claims Processing Facility. And what I'm going to do is ask you about trust claims that were submitted in these six cases.

A. Okay.

MR. SWETT: 1,600?

MR. SANDERS: My understanding is it's Garlock 1,600.

Q. Now, Mr. McClain, more accurately I'm going to ask you about five of those cases, because in one of the six cases there were no filings against insulation manufacturers.

But in five of those cases, your firm submitted trust claims against Owens Corning and Fibreboard. Do you have any reason to disagree with that?

A. I'd have to know the case. You can show me the name of

the case. And I could look at it.

MR. SANDERS: May I do that? Is that -- may I approach, Your Honor?

THE COURT: Yes, sir.

BY MR. SANDERS:

Q. I'm going to put them in alphabetical order for you.

And remember, Mr. McClain, we don't want to mention the -- we don't want to mention the claimant's names.

What is in the box --

A. Okay.

Q. -- is the one that we're dealing with.

A. Okay.

Q. What's in the box.

A. Okay.

Q. And here, you can see, this is the -- this is the date that the claim was received by the trust.

A. By OCF.

Q. Correct. Well -- here are abbreviations -- this is the trust in this client's case. AWI, that means Armstrong world Industries.

A. Okay.

Q. Let me, just -- if you'll -- it will help you OC -- I'll represent to you, is Owens Corning.

A. Right.

Q. And FB is Fibreboard.

A. Okay.
Q. And then if you look at these columns, you have the date, that will be the date received by the trust, and this is the approved -- this is the status, and here's the payment date on the --
A. Okay. Okay.
Q. So in going in alphabetical order in that first case, you can see that the AWI Trust claim was filed on November of 2008. Do you see that?
A. I do, and never approved.
Q. Right. Hasn't been approved.
A. No payment.
Q. But submitted based on actual exposure.
A. We submitted because we thought there was exposure there, the trust disagreed with us, wouldn't pay it.
Q. All right. If you go to the next page you'll see there was a claim submitted on January 9, 2008 against Owens Corning, that trust?
A. That's different. With the Owens Corning Trust, is the one trust I said you don't have to show exposure to. You just have to show that they were at the site. So we -- if -- if our client was at a site that was approved, we could submit under that trust, a trust claim, and they would approve it because it was at that site, even though he may not have been exposed.

Q. Isn't the site -- isn't the site shorthand for presumed exposure?
A. That's what OCF does. It's not -- that doesn't mean that there's -- that there was exposure there that we could prove it. I don't know if we could prove that exposure. I can't say. I could say that it met the criteria of that trust. As I said, there were two trusts -- two or three trusts that it was perhaps easier in the tort system, the rest of them seemed to be harder; OCF is one of those trusts.
Q. All right. If you go to the next page for this claimant, you'll see that your firm submitted a trust claim against Fibreboard, do you see that?
A. I do.
Q. That was on December 20, 2007?
A. Right. And I'm not -- I don't do the trust claim with Fibreboard. I know OCF and Fibreboard were the same company, and the same trust. I don't know -- I can't tell you what that means. If that was a site or if that was actually exposure, I can't tell you.
Q. Now let's go to the next one, the next client of your firm's. And you see that your firm submitted a trust claim against Owens Corning on October 23rd, 2007. Do you see that?
A. I do. Again that was based upon a site.
Q. Right. And then the next page you see that your firm submitted a trust claim against Fibreboard on the same date,

October 23rd, 2007?
A. Yes, sir. Again, part of OCF, I think, but I'm not sure.
Q. And let's go to the next client.
A. So there were two claims submitted in that case, and three claims submitted in the first case.
Q. Well, I'm just -- I'm just going over the insulation defendants. I'm not going over all the trust claims. I'm just going over the insulation manufacturers.
This next case you'll see that an Owens Corning Trust claim was submitted on October 16, 2007. Do you see that?
A. I do.
Q. Then if you turn the page you'll see one was submitted to the Fibreboard Trust on the same date?
A. I do.
Q. Let's go to the next one.
A. I guess we did two claims against insulation defendants in that case.
Q. Correct. And now let's look at the next client. And it's the same story, a trust claim submitted against Owens Corning on July 28, 2008. Do you see that?
A. Based on the site, that's correct.
Q. And then you go to the next page and there's one submitted to the Fibreboard Trust on the same date, July 28, 2008 --
A. That's correct.

Q. -- is that right?
A. That's correct, two claims.
Q. And then the next one is -- this is the last one, there is an AWI Trust claim submitted on November 12, 2007. Do you see that?
A. I do.
Q. And then the next two pages against Owens Corning and Fibreboard, one on November 12th, 2007 against Owens Corning. Do you see that?
A. I do.
Q. And then the next page is November 20th, 2007 against Fibreboard. Do you see that?
A. I do.
Q. In these cases we talked about, again, let's avoid naming the people's names.
A. Let's go Case No. 1, Case No. 2, Case No. 3.
Q. Yeah, let's do that. I'll submit to you that in Case No. 1, that that person was in the Navy and an electrician. Does that sound right to you?
A. Engine man, I think.
Q. Okay.
A. He was an engine man.
Q. All right. Then let's go to Case No. 2.
A. Do you want me to explain his exposure or not?
Q. No, don't need you to do that.

A. Okay.
Q. The next one, Case No. 2, that person was a plumber and pipefitter. Does that sound right?
A. That's correct, a plumber.
Q. And then in Case No. 3 that person was a machinist with power company in southern California?
A. Southern California Edison machinist.
Q. All right. And the next one, that person was an HVAC mechanic, that sound right to you?
A. He was a plumber.
Q. A plumber. All right.
And the last one, that person was a maintenance worker and boiler operator, right?
A. Boiler tech, I think.
Q. Okay. And none of these clients are insulators or shipyard workers, are they?
A. That's correct.
Q. And just to be clear, Owens Corning, they were responsible for the Kaylo asbestos pipe covering, right?
A. From 19 -- from 1953 they distributed it from 1958 on they manufactured it until 1972.
Q. All right. And then the Fibreboard Trust was responsible for the Pabco asbestos pipe covering; is that right?
A. That's correct, up to 1972 had asbestos in it.
Q. When we look at these trust claims, Mr. McClain, isn't it

fair to say that -- and all these trust claims were submitted after 2007, that your firm had been able to develop evidence of exposure to asbestos manufacturers?

A. As I said, it appears that we thought there was exposure to AWI. It appears we thought that our client was on the site to OCF -- most of these are OCF. The only ones besides OCF and Fibreboard that we submitted to, where we would allege actual exposure were, we alleged it in (redacted) -- excuse me, case No. 1, and that was denied. We didn't allege it in the Case No. 2. We didn't allege it in Case No. 3. In Case No. 4 we didn't allege it. And in Case No. 5 we alleged it to AWI.

Q. And when you say, didn't allege it, is this your site list explanation, is that what you're talking about?

A. Well, you have to understand, except for the couple of OCF and JM, maybe Celotex, Fibreboard may be the same as OCF, I'm not sure, since they're together. Except for those -- those you're eligible if your client was at the site, whether or not he was exposed. For all the other trusts, you have to prove -- you have to allege and show exposure. So when we submit to AWI, we thought we had actual exposures. We thought that there was exposure to one of their products that we submitted. Unfortunately, in one of the cases, the trust didn't think we had enough.

Q. The site list is based -- those are developed because

there was significant bad asbestos exposure at the sites, right? Isn't that the genesis of the site lists?
A. My understanding is, it was identified that they had product at that site. That does not get me in the tort system to prove a case.
Q. You talked about discussing settlement values with Mr. Glaspy. You all talked about --
THE COURT: Before you do that, let's take a break.
MR. SANDERS: Thank you, Your Honor.
THE COURT: Break until 11:30.
(A brief recess was taken in the proceedings at 11:19; court reconvened at 11:31 a.m.)
THE COURT: Mr. Sanders.
MR. SANDERS: Thank you, Your Honor.
Q. Before the break, Mr. McClain, we were talking about your discussions with Mr. Glaspy. Do you remember that?
A. Refresh what the subject was. I had a lot of discussions with Mr. Glaspy.
Q. We'll do that right now. Let me ask you, in the discussions with Mr. Glaspy, did you and he ever discuss the O'Neil case and the ramifications that that would have, if any?
A. The Taylor case.
Q. The O'Neil --
A. Oh.

Q. O'Neil case.
A. Taylor is the same as O'Neil. And Taylor was in 2009, and it held the same as O'Neil case. And we discussed at length the Taylor case when we were discussing our group of cases in 2009. We started that discussion in October, and there was extensive discussions of why Garlock would have to pay a lot more money now, than they had in the previous groups. Because the Taylor case.
Q. All right. You and Mr. Glaspy discussed the fact that there were bankruptcy trusts online; is that right?
A. I'm sure.
Q. Because he would have brought those up to try to negotiate you down, right, and cause payments being made by bankruptcy trusts?
A. I remember the discussion that they were insignificant payments compared to the value of the case.
Q. You would have been saying they were insignificant, right?
A. Yes.
Q. But he was bringing them up to try to get the numbers down, right?
A. Mr. Glaspy was a very fine attorney and brought up every single factor and every defendant in the tort system and without the tort system, including employers you couldn't sue to try to get the numbers down, that's correct.

Q. You didn't tell Mr. Glaspy in these discussions about specific trust claims that had been filed on behalf of your clients, did you, or at least you don't remember telling him about those, do you?
A. I'm not sure. I mean, I know I've had discussions with defendants about whether or not we have trust claims, or whether they're going to get paid. And I can't honestly tell you -- I can't remember what discussions I had on that subject with Mr. Glaspy. I may have, I just can't remember.
Q. Going back to the -- still talking about trust claims, but going back to those DCPF Trust claims that we discussed before the break that your company -- I mean, that your firm submitted.

I want to be clear, is it your testimony that those were the only insulation manufacturing -- insulation manufacturer trust claims that your firm filed? Because we don't have all the information. So I want to be clear that those trust claims that we discussed -- is it your testimony that was the sum total of insulation manufacturer trust claims that your firm filed on behalf of those clients?
A. I don't know. I can't remember. I do want to clarify one thing.

When I said those OCF site lists, other defendants, other trusts have site lists. But unlike OCF and Johns-Manville, that is not enough to get the claim approved, you have to

prove more than that. With OCF and Johns-Manville, at least site list will get you paid -- approved.

But I cannot tell you whether or not -- I don't recall these cases and whether there were other insulation trusts that we -- that we applied to. I could tell you that some of the cases I doubt, because I know the exposures. And I doubt if we could have proven insulation exposure to some of the plumbers and others, but I can't tell you.

Q. Your firm, the Kazan firm is on the trust advisory committee for -- has been on the trust advisory committee for a number of these bankruptcies; is that correct?

A. That's correct.

Q. Your firm was on the AC&S Trust; is that right?

A. My partner Steven Kazan is, yes.

Q. And the Armstrong World Industries Trust, correct?

A. Again, almost all these are by my partner, but he is on these trusts, that's correct.

Q. The Babcox and Wilcock Trust.

A. I believe that's correct.

Q. Celotex.

A. I believe that's correct.

Q. Combustion Engineering.

A. I believe that's correct.

Q. DII.

A. Who is DII?

Q. That's connected with Halliburton.
A. Oh okay. I believe that's correct.
Q. Federal Mogul.
A. I think that's correct.
Q. JT Thorp.
A. I am.
Q. Kaiser Aluminum.
A. I believe that's correct.
Q. Fibreboard.
A. I believe that's correct.
Q. Owens Corning.
A. I believe that's correct.
Q. Plibrico.
A. If you tell me it's correct, I haven't heard that, but I take it for granted that what you say is correct.
Q. THAN?
A. Turner Newell, is that?
Q. No.
A. T H --
Q. What's the acronym? THAN.
A. THAN. I wouldn't know. But if it's there, it's probably true.
Q. I'm representing that --
A. It would be reasonable to assume that we were.
Q. And USG.

A. I believe that's correct.
Q. And Western Asbestos.
A. I am.
Q. Your firm wrote the rules for these trusts by virtue of being on these trust advisory committees, right?
A. I can tell you from my personal experience. I was not involved in the others, my partner was and I can't answer. But I've been on a couple of them myself, JT Thorp and the Western. And I can tell you -- I can answer questions from my perspective on those.
Q. Well, what's your perspective on those? Were you involved in helping write the rules?
A. I don't know what you mean by rules. We were --
Q. Let me ask you specifically, but I'm talking about things like definition of what a site list is, or what a site is?
A. Well, I can tell from you my experience at Western MacArthur. What we did is, we solicited the information that would have been gathered through the tort system of where Western had been identified. And we submitted that to the futures representative and a debtors' representative. And we said that these are proof, and we gave them the witnesses who testified to the Western being at that sites, the depositions, the documents. And then there was a discussion between the futures and the debtors and the committee as to which ones were legitimate and which ones were not. I think the final

decision was made by the debtors and the futures.
Q. At your deposition on Monday I asked you if your firm filed trust claims based on actual exposures. Do you remember that?
A. Yes.
Q. And you said that they did.
A. Yes. Except as I said, there were about three or four -- I think three different trusts that you could do by sites only.
Q. When we -- when I asked you that line of questions on Monday, you didn't say anything about the sites, did you?
A. I think I mentioned that there were three -- three that were less onerous than the tort system.
Q. I don't remember that if you did, but --
A. I think I said.
Q. -- Mr. Pratt's checking. At page 78.
A. It was during the time you were asking me about, is it harder to get a claim through in the tort system. And I said, I think through trusts.
Q. All right. At page 78 of your deposition the question was, "And then do you file the trust claims based on exposures -- actual exposures?
And your answer was, "That's correct".
Then the question, "So you wouldn't file a trust claim unless you had some proof of actual exposure; is that right?"

Your answer, "That's right.

The question, "You got to have some basis?"

Your answer, "that's correct".

And then the question was, "So the difference between -- in your mind, between trust and ballot is, trust is actual exposures, a ballot is potential exposure; is that right?"

Your answer, "That's right". Then just to another question, you're going to ask me, that doesn't mean even though we believe we had actual exposure, the trust agrees with us."

I'm not seeing anything about the sites. But maybe on redirect they can cover that with you.

A. Is that a question? Because I can answer that question.

Q. That was just a comment, sorry. It wasn't a question.

A. You don't want me to answer what you read? Cause I can answer that. I think I was consistent.

Q. That was your testimony, correct?

A. And I think it still would be my testimony because a site is actual exposure for those trusts.

Q. All right. Thank you.

In your discussions with Mr. Glaspy, you negotiated each case individually; is that right?

A. That's correct.

Q. And you all talked about other shares, I mean that mattered in your discussions; is that right?

A. Absolutely.
Q. And you discussed other shares in every case; is that right?
A. That's right.
Q. I want to switch gears a little bit and ask you about litigating cases with Garlock.
Is it fair to say, Mr. Glaspy (sic), that there was a -- you described this some in your direct -- but is it fair to say that there was a standdown with respect to Garlock in most of your cases? Garlock didn't participate in the trials?
A. That's correct.
Q. And they participated in some discovery, but not all discovery; is that right?
A. They participated in some discovery and didn't initiate other discoveries and some of the other defendants did, that's correct.
Q. By participating less, they would have spent less on attorneys fees, that's pretty obvious, right?
A. Right, I guess.
Q. And then on your firm side, you all push hard in discovery, right? You went after the information hard, right? Made motions to compel, that sort of thing?
A. Depending on the defendant, and depending on whether or not they would fully answer our discovery. Some defendants would object and refuse to answer discovery and we would have

to do motions to compel. Other defendants answered fully and we wouldn't have to do it. So it all depends on the defense actions.

Q. Didn't you tell me Monday that you made a lot -- your firm made a lot of motions to compel?

A. We have made a lot of motions to compel against those defendants who were not forthcoming.

Q. And those motions to compel increase costs for those defendants that were not forthcoming, right, they've got to spend time and money, right?

A. Yes, I'm sure that's true.

Q. We talked about your firm's verdict history with Garlock, and I know you have an explanation for that. But if you just look at the results, those don't show trial risks, do they -- the zeros, all the Garlock wins.

A. I'm not so sure Mr. Glaspy would agree they don't show trial risk. I think he knows the facts of those cases. But if you were looking at it without understanding what was behind those cases, you would assume that, that's correct.

Q. Assume that that is correct, do you think just maybe that it might have been the high costs of defense that were driving the settlements with your firm?

A. I know that is not true.

Q. You don't know what Garlock was thinking, do you?

A. They've expressed to me, and other defendants have

expressed to me on this subject repeatedly, their approach.
Q. Mr. Glaspy never volunteered weaknesses to you in your discussions did he?
A. I wouldn't consider that a weakness. That's not what I'm talking about.
Q. Did Mr. Glaspy talk about with you, the high cost of defense then?
A. Never. In fact, the opposite had been said by every defendant I've ever dealt with, and that is, that I could never discuss costs of defense or nuisance value with any of them, because if they paid, because of cost of defense or nuisance value, there would be tens of thousands more cases filed against them.

And no defendant would ever allow us to enter into discussions about that. And that was true of Garlock. I never entered into any discussions with Garlock or anything about cost of defense or nuisance value. It was only on what is the value of this case. What is the risk to Garlock. What is their proportional share. That was absolutely true with every defendant including Garlock.

MR. SANDERS: No further questions, Your Honor.

THE COURT: Okay. Mr. Swett.

MR. SWETT: Your Honor, first of all, by a slip of the tongue, Mr. McClain mentioned a claimant's name. We have an agreement that they're not to be identified by name in this

process. And I would ask the court's leave with, I hope the consent of the debtors, to strike the name mentioned from the record.

THE COURT: All right. We'll just change that to Claimant 2?

THE WITNESS: Claimant No. 1.

THE COURT: That was Claimant No. 1.

It's like Dragnet, and change the names to protect the innocent.

REDIRECT EXAMINATION

BY MR. SWETT:

Q. With respect to case numbers one through five, do you have in mind the exposure facts of those cases as they relate to Garlock?

A. I do.

Q. Explain please what the nature of the Garlock exposure was in Case No. 1?

A. He was an engine man, and I think was in the Navy for about a year, or was exposed where it was a year, and he worked directly with gaskets, that was his job. He would have to remove gaskets that were -- with a wire brush. They would create dust. He said they created dust. He would have to cut out gaskets, and he would use a hammer to hammer them out and cut and that created dust. He would put the gaskets on. That was his primary job. Garlock was identified as the primary

gasket that he would use.
Q. This was visible dust?
A. This was visible dust, which was significant.
Q. Why so?
A. At every trial we show that if you have 5 million particles of cubic foot of asbestos dust, you can't see it. Five million particles of asbestos dust, you can't see it. If you see visible dust, it's greater than that. And therefore the exposures when you see visible dust are very large and --
MR. SANDERS: Objection; expert testimony again, Your Honor.
MR. SWETT: He's explaining the significance --
THE COURT: I would accept that as he's explaining the answer, so go ahead.
THE WITNESS: And that we showed Garlock's product contained 80 percent of asbestos versus the insulation was 15 percent.
BY MR. SWETT:
Q. Case No. 2, you had in mind the exposure facts of Case No. 2 as they pertained to Garlock.
A. Let me get them in alphabetical order. Yes. That was a plumber, who worked extensively on land with asbestos Garlock gaskets. That's what he did. That was his main -- one of his main exposures and he removed and cut out and did those -- and had those exposures for a number of -- for almost 30 years.

Q. How about Case No. 3.
A. All these people were in their mid-60s. Some of them had extensive wage loss. They all had spouses and children.
No. 3, he was the machinist at Southern California, Edison, as machinist. His primary duties were to do gaskets. To repair and change out gaskets. He did that. There was extensive ID of Garlock gaskets and his exposure to dust from using those Garlock gaskets. He had a $2.3 million economic loss.
Q. How about Case No. 4.
A. Case No. 4 was, he was a plumber in the Midwest, I believe. And he worked extensively with -- primarily with gaskets, that's what he did. And he would do the same things I described others did, and had extensive exposure.
Q. How about Case No. 5.
A. Case No. 5, he worked in -- he was in the Navy. He was dead, unfortunately. He died, so we didn't have ID from him. We found a co-worker who worked side by side with him. He was a boiler tech, I think of Mr. -- Case No. 5's co-worker. And his co-worker described working on pumps, valves, compressors, both of them did. They used Garlock gaskets. He identified Garlock gaskets. He identified the same type of exposures.
And he also stated that none of the equipment that they were removing gaskets from, the pumps, the compressors, and all that stuff were insulated. They were all not insulated.

So the only exposure to those products were to the gaskets.

And on all these cases, since they were before Taylor, we got lots of money because of Garlock exposure from the equipment -- from the equipment manufacturers, the pump, valves, compressors, that paid, which we couldn't have done in 2009.

MR. SWETT: No further questions. Thank you.

THE COURT: You can step down, thank you.

MR. SANDERS: Nothing further from us.

MR. CASSADA: Your Honor, before Mr. McClain leaves the courtroom, I would like to make an application on behalf of debtors.

Mr. McClain testified on Direct, that his clients' claims became more available against Garlock after the 2000s when the insulation companies filed for bankruptcy, because his clients, based on their changed situation, could no longer identify exposure to insulation companies. He said -- he gave this testimony both for settled -- claims settled during the 2000s and claims pending. I think you heard his testimony about how valuable his pending -- clients' pending claims against Garlock.

Based on testimony on direct examination, we request that Mr. McClain be required to produce the following documents:

First, for the claims of his firm on the debtors'

RFA list, all trust claims and attachments, all ballots, and any discovery, including interrogatories and depositions, identifying the products of the -- all companies that his clients could identify.

And for a sample of 20 pending claims, we would request that Mr. McClain produce all trust claims, plus attachments filed through the date of production, ballots and post-petition, depositions and interrogatory answers of his client -- that his clients have -- gave in discovery.

MR. SWETT: Your Honor --

MR. CASSADA: We believe that that discovery is necessary and fair to give us a chance to test the veracity of his story that somehow his clients during the 2000s were different from his clients in the 1990s, because they could no longer identify insulation exposure.

MR. SWETT: Your Honor, Garlock has considerable data in its database about the claims assert on behalf of clients by the Kazan firm against Garlock. Its database includes the occupation. It is in the perfect position already, to test the assertions that this gentleman has made on the stand. There is no reasonable occasion for a sample. And no other law firm was required to produce a sample, let alone a sample of 20 pending claims.

With regard to the five or six cases on the RFA list, I would like to confer with Mr. McClain at a break, but

I believe that we would be able to work out something on that score, if the debtors refrain from putting the firm to the burden of reproducing to Garlock, tort system discovery that Garlock already received from the Kazan firm in the normal course.

With that comment, I would like to have the opportunity to consult with Mr. McClain to see what he would be willing to do voluntarily.

But I do think that the notion of a sample at this late date is beyond the scope. This is more than any fair response to what he's testified to here today. Mr. Glaspy has given no sample. Mr. Turlick has given no sample. And it just seems to me to be disproportionately unfair.

THE COURT: Let me let you all talk about it and deal with it after lunch.

MR. SWETT: Deal with that after lunch, is that what you said?

THE COURT: You said you needed a break --

MR. SWETT: Yes.

THE COURT: After lunch.

MR. SWETT: Okay.

THE COURT: Thank you. Step down.

THE WITNESS: Thank you, Your Honor.

MR. SWETT: Your Honor, the committee calls Joe Rice.

JOSEPH F. RICE,

being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. SWETT:

Q. Good morning, Mr. Rice.

A. Good morning.

Q. Would you please tell the judge your full name.

A. Joseph F. Rice.

Q. What is your profession, sir?

A. I am an attorney.

Q. What is your relationship to the Official Committee of Asbestos Personal Injury Claimants in this Garlock bankruptcy?

A. I am co-chair of that committee.

Q. Where are you from?

A. I grew up in Gastonia, North Carolina from the sixth grade -- after the sixth grade until sophomore year in college. And then my dad left work in Cramerton and moved to Whiteville, North Carolina, and I moved to North Myrtle Beach. It was a lot of fun in my college days.

Q. Where did you go to college?

A. University of South Carolina.

Q. Where did you go to law school?

A. University of South Carolina.

Q. When did you graduate?

A. Undergraduate in 1976, in law in 1979.

Q. Have you played any role for the committee with respect to communications with EnPro in the course of the case?
A. I have had numerous opportunities to meet with Mr. Magee and his colleagues over the course of the last few years. And I've had the opportunity to entertain the CEO in my office in Charleston on one occasion.
Q. Where did you enter legal practice?
A. Say again?
Q. Where did you enter legal practice?
A. When I finished law school in 1979, I went to work for a law firm known as Blatt and Fales at the time in Barnwell, South Carolina.
Q. Would you describe, please, the progress of your career through the various firms you've been associated with.
A. I was the eighth -- I think the eighth attorney in the Blatt and Fales law firm in Barnwell.

And in 1975 or so, Ron Motley and Terry Richardson had joined the firm as young attorneys. And they had developed at that time, products liability law was sort of developing. They had developed an interest in asbestos litigation.

So in -- when I joined the firm in 1979, I was hired to work on a case involving Allied General Nuclear Services, in a contract dispute over the reprocessing of spent nuclear fuel. About a year after that I got involved at the invitation of Ron Motley to go try an asbestos case.

And since 1981 or so, '82 I guess is when I tried the case, I have been doing asbestos litigation of one type or another among other things in the later years.

Q. What other areas have you had significant involvement in?

A. Starting in about 1994, our law firm got involved in the tobacco litigation representing the State of Mississippi and the State of Florida, and ultimately representing 26 states in the tobacco litigation. My role in that was to be the coordinator of resolution. And I spent a good bit of time during the '96, '97, '98 timeframe working on the -- what became the master settlement agreement for the State's Tobacco Litigation that resulted in over $300 billion settlement for the states.

Q. Apart from asbestos matters, what matters loom large on your dockets these days?

A. I'm spending a lot of time in New Orleans these days. I'm lead negotiator -- co-lead negotiator for the plaintiff steering committee in the BP Oil spill MDL, and negotiated the recent class action settlement that's being debated whether it will settle for 8 billion or 16 billion. And I'm spending a lot of time processing and working with that. We seem to have some difference of opinion with BP as to how the document works today.

Q. Do you remember your first asbestos trial?

A. I do.

Q. Tell us about that, please.
A. I tried a case with my co-counsel was Mike Polk, out of Hastings, Minnesota. We tried it in Minneapolis in the state court, and Oscar Parsons was my client. Mr. Parsons had lung cancer. And I tried my first case against Johns-Manville, Owens Corning and Fibreboard.
Q. When was that?
A. 1982, before Manville filed bankruptcy.
Q. When did Manville file?
A. August 26, 1982. A day that will never be forgotten by a plaintiff's lawyer in asbestos.
Q. Why is that?
A. It was quite significant to our world at that time.
Q. How so?
A. Well, everything we knew and everything we've done -- remember, asbestos was fairly new. The Borel decision had come down, but the litigation had really started happening in the '77, '78, '79 timeframe. So everybody had concentrated on building their liability case against Johns-Manville.

Manville was a dominant factor in the asbestos industry, had multiple kinds of products from gasket, packing, pipe covering, raw fiber, and they were a target defendant at the time. That's what people been working on.

So all of sudden you've got, you know, what at that time we felt was a large number of cases, filed around the country

and most people were concentrating on Manville. They were, I think when Manville filed bankruptcy, they disclosed they had 16,000 cases. And they were overloaded with asbestos liability with 16,000 cases.

Q. What was the impact on co-defendants at Manville's filing?

A. We -- from the plaintiff's perspective, we had to regroup and start looking at the other viable defendants.

When I tried my first case, I had Owens Corning in the case. I didn't care about Owens Corning. I didn't really care about Fibreboard. They were there, I put on evidence about them, but all my liability was focused on Manville. I was in joint and several jurisdiction. Manville had the best evidence.

And you've got evidence where their medical director is saying, the less said about asbestos the better off we are, the less said about disease the better off we are, you know, you got great documents, so you use them.

Q. Did you have, at that stage, similar evidence with respect to Pittsburgh Corning or Owens Corning?

A. We never had as good evidence against Owens Corning or Pittsburgh Corning or Fibreboard as we had against Manville. We had good evidence over the years we developed, but not at that time. We had some.

Q. That evidence was developed in the wake of the Manville

bankruptcy?
A. Yeah, I mean, once we started looking at other defendants, we developed evidence against other defendants. And then, you know, you can't do but so much at one time. So we had done massive document review for all of Manville. We started doing the same thing with new defendants or existing defendants that we just expanded our efforts on.
Q. And what did that do to their exposure to litigation?
A. Well, when -- in vast majority of situations, when we've gone looking to investigate the knowledge and the facts of a company that manufactured or used asbestos as part of its manufacturing process, we have found incriminating evidence of one type or another. And as we find it, it increases their role, it increases their propensity to get sued, and increases their resolution costs, or puts them at higher risk of burden.
Q. Now, did you spend -- go forward from the time of that first trial for the next several years. Is it fair to say that you were concentrating on the trial of asbestos cases in that period of time?
A. During the 1980s, yes. I then continued to try asbestos cases. And Ron Motley, my partner, still my partner today, was considered to be, you know, one of the top asbestos trial lawyers, still is today. And we -- our business model is a little different than other law firms.
You just heard David McClain. And David and his partner

Steve Kazan, they practice and they file cases in California. Well, we were from Barnwell, South Carolina. And there's not a lot of cases down there by itself.

So what we developed was a business model where we were national counsel to other law firms. So we developed a co-counsel network. And we would have co-counsel in states you know, most every state east of the Mississippi at the time. And then Texas was -- we had co-counsel there.

So we would travel around the country and travel -- and try cases for people. And as we got into the 1980s, late '80 timeframe, the courts were starting to look at larger volumes of cases. Because when Manville filed -- what happened, Manville filed, there were 16,000 cases.

We started working harder looking for new defendants. In doing so, we started doing more discovery. We went to the unions and to try to get job site lists, and all kind of ways to try to prove exposure.

As that happened, the unions and others got more interested in what is this asbestos about. So they started educating their workers. As a result of that, screening programs started taking place, and the volume of litigation started to increase. As the volume of litigation started to increase, the volume of filing cases increased. As the volume of filing cases increased, the pressure on the courts to do something with those cases increased. As pressure increased

to do something with cases, the courts got more initiative and started trying cases by reverse bifurcation was one methodology and consolidation.

Our law firm was sort of the leader in putting together models for trying cases. And we tried consolidated cases -- Monongalia County, West Virginia. We call it Mon. Mass. We tried a Mon. Mass One, Mon. Mass Two, Mon. Mass Three, West Virginia cases.

Judge Parker in Texas consolidated about 2,500 cases in one trial in Texas, in the Cimino case, where he certified a class of common issues, and then did a Rule 42 consolidation on all the cases. And we tried an all the issues class, and then we tried 160 individual cases on liability of different disease levels.

In Mississippi we tried Abrams One and Abrams Two, both consolidations of over 4,000 -- 5,000 cases each.

And then probably the largest one I ever tried was in the early '90s in Baltimore. And our firm was lead trial counsel with the Angelos firm in the Abate consolidation, right at 10,000 cases that were consolidated.

Q. That's A-B-A-T-E, isn't it?

A. A-B-A-T-E.

Q. Let's go back to the Cimino case where there was an effort at consolidating -- extrapolating from specific trial results to other cases.

What was the outcome in terms of the liability of that mode of dealing with the individual cases?

A. Well, when we started Cimino, there were a number of defendants, obviously through the pretrial process there were settlements with most defendants. My recollection is, that we went to trial, ultimately against Celotex, Pittsburgh Corning, and Fibreboard.

We tried with Judge Parker, the common issues of were the products hazardous; were the defendants grossly negligent. And we called it the, "can it causation". Can the product cause these various diseases.

At the conclusion of that, Judge Parker had a statistical program setup through one of the universities and they randomly selected from the 27- or 2,800 cases, 160 individual cases. Then Judge Parker divided those cases into groups of five to six cases at a time, could have been up to eight at some, it's been a long time -- 1990, '89, 90 timeframe.

And he gave us two federal courtrooms, with two federal judges, and we spent six months bouncing back and forth, and we tried 160 cases in six months to -- in groups of five or six cases. There were, you know, a percentage of mesos, a percentage of other cancers, a percentage of lung cancers, and a predominant number were nonmalignant cases.

Q. And what was the outcome at the trial level; and following that, what was the outcome on appeal?

A. We -- at the trial level, we -- in the 160 cases, I can't -- I think we prevailed in about 90 -- 90 plus percent of them. Might prevailed at 100 percent. I think it was 95 percent.

And it was interesting that at the time the mesothelioma cases we were trying were death cases. But most of the nonmalignant cases were living cases. And we found that the jury brought back verdicts in the nonmalignant cases, close to or higher than they did in some of the wrongful death cases, because of the progressive nature of the disease, and the future risk of developing cancer.

So the nonmalignants were compensated for what they had; what they were going to have to live with; and what they had to look forward to.

So our average verdict in the nonmalignant cases was in excess of a million dollars in those cases, and that's reported in the Fifth Circuit.

The case was appealed to the Fifth Circuit. The Fifth Circuit upheld the consolidations, upheld the common findings, upheld the verdicts in the 160 cases.

But what Judge Parker's plan was, was to take the statistical analysis of the 160 cases by disease, and extrapolate that to a value for the rest of the cases in the certified class. And the Fifth Circuit, he also was extrapolating causation. They said he could not consolidate

and extrapolate through the causation process. So they sent it back for further proceedings, but upheld 160 cases.

We -- during the appellate process, we had reached a settlement with Fibreboard. During the appellate process Celotex filed bankruptcy. And the cases are still pending against Pittsburgh Corning, waiting payment from the confirmation of the Pittsburgh Corning bankruptcy, which is in now about its ninth or 10th year bankruptcy.

Q. Did there come a time when judicial experimentation with large consolidations of asbestos personal injury cases came to an end?

A. Well, during this time, now we're in the late '80s, early '90s, and the asbestos litigation was dominated by the federal court system. And you had about five or six federal judges that had the largest dockets. Judge Weinstein in New York, Judge Lambros in Ohio, Judge Parker, and there were a few others.

Those judges got together and called a meeting with a Federal Judicial Center -- and we call it the Dolly Madison Meeting, because it was held at the Dolly Madison Judicial Center up near the White House -- to talk about the asbestos litigation and what it was doing to the federal court system.

There had been in the past, several efforts to create a multi-district litigation, MDL process for asbestos. But it had been resisted, both by plaintiffs and probably defendants

early on. But now they decided that there was going to be another effort.

So there was a MDL process started, and I can't remember the exact date that MDL 875 started, but it was in the late '80s, early '90s timeframe. I got a time chart, I just don't have it up here with me.

As the MDL started, all federal cases basically shut down, because all of the cases were moved to Philadelphia, MDL 875.

As a result of the MDL process, there was no alternative in federal court for cases to go to trial. And those cases that had historically been filed in federal court, were now trying to find a way in state court. So you saw the growth of filing litigation in the various state courts around the country rapidly increase.

At this time there were a lot of efforts to try to see if there was some way to come up with a alternative dispute resolution method to resolve the asbestos litigation. One of the largest efforts was an attempt to negotiate a settlement class action.

At that time in our judicial process, there hadn't been a lot of settlement class actions. There been litigation class actions, but not settlement class actions.

Gene Locks with Greitzer Locks in Philadelphia, and Ron Motley were co-chairs of the asbestos committee on the MDL.

And when Ron and I finished trying the Baltimore case, we joined with Gene Locks who had been having some discussions with the leadership of what was known at that time as the CCR. And we started negotiating for a national settlement class action.

Q. What was the goal?

A. The goal was tried to create a method of developing a out-of-court resolution process that would have standard approaches to medical, and to exposures that would pay uniform dollars that would help the defendants preserve dollars over time, but assure the claimants the money would be there over time so they would get paid for the disease they had now, but if they got worse later, they would have a place to go to get more money for their compensation. So if they got paid for nonmalignant, then they later got lung cancer, they would get a second compensation.

There was a simultaneous settlement process and ultimate litigation with the defendants against the insurance industry, also filed in Pennsylvania, to try to force the insurance industry to come in and fund this process.

So we ultimately filed what was -- the time we filed it was known as Carlough -- the Carlough Class Action Settlement. Subsequently a new plaintiff was substituted by the name of Georgine, who was one of the national executives for the AFL-CIO building trades. So the case got called Georgine, and

that litigated through -- we filed that January '93, and that got litigated through the court system until ultimately the Supreme Court reversed the certified class.

Q. A class action resolution of future as yet unfiled asbestos claims was proposed?

A. It was a settlement -- a negotiated settlement by law firm of a large volume of the present cases. We negotiated individual settlement agreements for -- and I don't remember it was 91 law firms, a large number of law firms. So a significant number of the existing cases were resolved and paid out over a period of time.

And then we negotiated a class action settlement process for future claimants. That was controversial among the plaintiff's bar. It was controversial to some extent among the defense bar. But it was litigated and it was approved by Judge Reed at the trial court level, but the Supreme Court reversed it on Rule 23 grounds. I don't remember the reversal was like '96 -- '97. That was the first class action that we negotiated.

Q. Along the way throughout this period there were bankruptcies from time to time?

A. Bankruptcies started in 19 -- actually Manville was probably the second or third bankruptcy. I can't remember the exact. I think UNARCO had filed, Manville filed, Raybestos filed. Raybestos was one of the largest at the time

packing-cloth-type defendants. Raybestos did not have insulation material as such, they had packing cloth, similar products to Garlock.

Q. You remember the bankruptcy of Eagle-Picher?

A. Eagle-Picher filed.

Q. Keene?

A. Yeah. There's a bunch of them filed.

Q. You mentioned Celotex?

A. Celotex had filed.

Q. In your practice, did you experience any impact from those other bankruptcies in terms of the values of the claims you were maintaining as regards other defendants?

A. The value of the injured party -- the damage done to the injured party, did not change depending on how many people contributed to the damage. The damage is what you value. So I'm valuing my claimant's injury and loss. That's what I as an attorney are responsible to try to recover for him or her.

So the value of my claim didn't change whether I'm sitting across the room from Johns-Manville, or Owens Corning or 10 people or a female lawyer or a male lawyer or 10 lawyers. The value of my claim is the same.

And over time as we got to try more cases, the jury started awarding higher numbers, and the values of the cases started going up.

And interesting enough, one of the reactions by the

defense bar -- an asbestos defense bar -- to the large volume of nonmalignant cases that were filed and consolidated and activists -- consolidation of cases both in state and federal courts, was a request by the court that they not try consolidated cases. That they were putting too much pressure on the financial assets of the defendants, and the money wasn't going to be there for the sick and dying and cancer victims.

So the defendants started requesting that the courts accelerate and only try cancer cases. And it goes with that old saying, be careful what you ask for. Because now what was happening is, we started getting more living meso cases set for trial, and the predominant trials were cancers and living mesotheliomas, living lung cancers, and the juries and the verdicts just started going up, and up, and up.

Because the plaintiffs were in a good situation because the plaintiffs' firms knew they were going to get their cancer cases tried, so they were able to put their resources into working up fewer volume of cases, but doing more work on that case to find more defendants to increase the value of the cases.

Q. Now, when any of those that went bankrupt over the course of the '80s or '90s came back in the form of settlement trusts, and began to pay claims, did you observe any impact, one way or the other, on the amounts you were able to collect

from the solvent defendants?

A. When -- when Manville came back the first time, when Manville came out on his first confirmed plan, Manville was paying 100 cents on the dollar of the negotiated value. It didn't have a matrix process or a TDP process. Shortly after it came out, that was disclosed as being a major disaster for the company, who went back into bankruptcy a second time.

Since the bankruptcy process has come out with the trust distribution model that has a scheduled value and pays a percentage, none of the bankruptcy trusts -- the payments are that significant on a one-on-one basis. So it's not had any relief factor to the tort system. The tort system valuation has grown much quicker and much higher than the bankruptcies.

Q. Now much of the testimony presented in this case so far has had to do with the phenomenon that the debtor has labeled a bankruptcy wave of the early 2000s.

Before we get to that, I want to drill down a little bit on the years just preceding 2000. What significant events were going on in the tort system in advance of that further development.

You spoke of the Georgine class action settlement as having been rejected by the Supreme Court.

A. We filed it in '93, and it was the first class action settlement filed. While it was working its way through the Philadelphia federal court, there was a second class action

that I was class counsel on with Steve Kazan and Harry Wartnick from California, that involved the Fibreboard Corporation. Fibreboard was a West Coast based manufacturing company, but they sold product all over the country, but it was, you know, their market share was larger on the West.

And they had been in litigation with their insurers CNA and Pacific Indemnity for a number of years about coverage. And Fibreboard had been a defendant in the Cimino case, and we had taken some large verdicts against them. And Kazan had taken large verdicts against them in San Francisco and Harry Wartnick was another attorney in San Francisco.

Fibreboard's problem was, they had no current assets, but they had a very large insurance asset, but they couldn't get it liquidated. They couldn't monetize that asset.

So we ended up doing -- at that time my firm's name had changed from Blatt Fales to Ness Motley. Mr. Blatt had passed away, and I had moved to Charleston from Barnwell.

We negotiated a Ness Motley Fibreboard settlement program. And because of our network of co-counsel, we had about 50 -- 55 law firms in about 30 states had joined that settlement. So we had aggregated a large volume of cases with a liquidated value against the insurers, and then we filed a suit in Texas to try to enforce that with Fibreboard.

Something I never seen happen before, Judge Parker who was sitting on the district court at the time, sent that case

to mediation. But the mediator was Judge Patrick Higgenbotham, who was sitting on the Fifth Circuit Court of Appeals. I never had a Court of Appeal judge come back and mediate a case before. So we mediated with Judge Higgenbotham.

And make a long story short, we ended up settling with Fibreboard, and there were two class actions filed in Texas. It was a class action where the plaintiffs had a class action settlement with Fibreboard. And I think the number was $2,150,000,000 or $2,125,000,000 or something like that.

Then there was a defense class, where the insurers sued Owens Illinois as representative of all defendants, to bind the settlement. Because the insurers at Fibreboard, wanted to be sure that their settlement stayed together, even if the plaintiff's settlement with Fibreboard didn't stay together, so they had finality around the resolution.

So now from it went from some time -- and we filed that in August -- I think that case was -- that class was filed in August of '93 I believe.

So now we were in the spring and the early summer of '93, going through the notice program in Georgine. And the defendants --

Q. What do you mean by that?

A. Well, when you do a class action, you do a national class action, you have to give notice to potential classrooms.

Remember, we're in -- I know it's hard to believe, but in '93/'94 everybody didn't have computers sitting on their desks and iPads, iPods, we weren't a 24/7 communication world. We actually used magazines and newspapers to give notice to people. We couldn't send out an email to everybody that we had their email address for.

So there was a massive public campaign -- notice campaign that was required by the court in Rule 23, you had to give the best notice available. And the CCR spent something in the neighborhood of $15 million advertising everywhere in every trade's journal, every magazine that advertised insulation materials or building materials or contract materials, in medical journals, in all of the big newspapers, both at the state level and national level.

There was a constant notice campaign for 30 to 45 days, that basically said, if you've ever been exposed to asbestos, if you ever worked with asbestos, your rights may be affected by this class action. Because anyone that hasn't manifested or hasn't already resolved, you're going to be a future claimant, potentially, so this class action is going to alternate your rights.

So all of a sudden everybody in the United States that pays attention because they got some interest in it, has now seen that, well, I worked around asbestos, maybe I got a problem, do I need to go get examined? And every doctor who

historically may not have said, well, if I got a patient who worked at the Charleston Naval Shipyard and got lung cancer, maybe I should send him to a lawyer to see if he's got a legal claim, because this could be compensation for him.

And it became legitimate for doctors to refer more and more patients to lawyers. And it became more legitimate for people that may not have independently gone and seek legal advice, to go seek legal advice. Which is what the notice is intended to do under the Supreme Court rules. So we had that occurring, and more and more people started coming to lawyers.

Right after the eight -- the Georgine notice, now we filed our class in -- with Judge Parker in Texas, and we start the Fibreboard notice campaign in late '93 or early '94, and we spend 6- or $7 million again, doing the same thing. But now instead of in Philadelphia, it's in Texas. And instead of being, I think, 20 defendants that were in the defendant settlement in Georgine, there were 20 defendants that were part of that class, it's Fibreboard and two insurance companies, plus we had the defendant class.

So during the late '93, early '94 timeframe, there was over $20 million of advertising put out promoting people looking at the potential of having asbestos-related disease.

As a result of that, the volume of cases continued to increase, and the state court filings continued to increase.

Q. Now, you spoke of an appeal having been taken in

Georgine. Who were the contending sides?
A. The asbestos plaintiff's bar versus the asbestos plaintiff's bar. There was a significant portion of the asbestos plaintiff's bar that felt that those of us that had negotiated the Georgine settlement, had not adequately provided enough compensation, had not dealt with all of the individual issues.

So there was a challenge to the Rule 23 requirements of commonality and predominance to say that the settlement class was a better way than litigation. And ultimately the Supreme Court found that we did not meet the Rule 23 requirements.
Q. You were on the side of the proponents of the proposed class action settlement?
A. I was class counsel, yes.
Q. Which side was the Kazan, McClain firm on?
A. They were on the other side.
Q. Do you remember a debate that took place in Mealey's publication between you and the Baron and Budd firm. You and Ron Motley on the one hand and Fred Baron on the other with regard to the desirability of that class action resolution?
A. Yes. At that time Fred Baron and Ron Motley, probably considered the two most prominent asbestos lawyers in the country, and Fred was against the Georgine settlement and Ron was for the Georgine settlement. And we had debates at face-to-face meetings, and in the newspapers, and in the trade

journals, such as the litigation report.
Q. Do you remember commenting, Mr. Rice, in those publications, on the share of the historical liability that had become bankrupt already by the 1993 timeframe?
A. Yeah, I wrote an article, just discussed the litigation, generally discussed the complexities and the changes. And I talked about what this settlement was intended to do was help preserve the financial assets that our clients were gonna need for the next 10 to 20 years. And we had already lost the financial assets that at one time was about 75 or 80 percent of the litigation.

So what we actually were litigating against at that time, only about 20 percent of the people that we were litigating against in the '80s and '90s were still solvent. So that's what we were trying to preserve. And I don't remember what the number was. But it was a significant number, 75, 80 percent, something like that.

Q. Now the settling defendants in Georgine were members of the organization called the Center for Claims Resolution or CCR?
A. They had been members of the Asbestos Claims Facility -- or the lawyers were known as the CCR.
Q. The Wellington Group is the same thing as the Asbestos Claims Facility?
A. Yes. The Wellington Group was formed in the '80s. Dean

Wellington, I think it was Yale Law School, helped put together a negotiated common defense group among about 20 of the asbestos manufacturing defendants, some -- you know, some I knew a lot about, some I knew very little bit. But they had common insurance.

Q. This was in the wake of Manville?

A. This is after Manville. And at the same time, the Wellington agreement also had those manufacturing defendants reach agreement with their insurers that created alternative dispute resolution methods to resolve insurance disputes.

So if like -- and I don't remember who all the insurers were, but if Travelers were in the Wellington Group, they may want all of their insureds to be in, because it had a method to resolve insurance disputes.

So the Asbestos Claims Facility actually brought new defendants to our mind in their profile.

Q. Was the ACF, upon occasion, a litigating defendant where that group was litigating through a single firm?

A. Yes, their methodology was -- we represent -- again, I don't remember the exact number. I think it was 20 asbestos manufacturing defendants were in Wellington, might have been give or take a few. But they were treated as one.

And so, if we went to trial against one, and we reached a resolution, we had to release all 20. And the money that was paid, was contributed by a formula that the defendants put

together that the plaintiffs had nothing to do with. If I named six members of the Asbestos Claims Facility, or I named all 20, it didn't really matter because I was going to release them all if I settled. And they had one defense lawyer and they had tried a common defense approach.

Q. Now that's the mid-'80s; isn't it?

A. It's the '80s. I can't remember the exact dates, '85 to '88, something like that.

Q. It didn't last very long?

A. It didn't last long.

Q. What was fallout to the breakup of ACF?

A. Why did they breakup?

Q. What was the fallout? What happened next?

A. Oh, the ACF broke up, now you've got a lot of defendants that thought their profile had been smaller before the ACF days. Because of the, you know, all-for-one-and-one-for-all approach of the ACF, the profile of those defendants grew. Because if you were gonna have to release the defendants, they were being named in the lawsuits. So they found that their volume of cases had increased. Because the ACF made it easier for the plaintiffs to put on their case, the values had gone up.

So as they started pulling out of the ACF, they had to come up with independent ways of dealing with now more cases than they had in the past, higher expectations by the

plaintiff's bar, and more law firms capable of trying cases against them in many, many more jurisdictions.

Q. Now, did some of the ACF members regroup and form another organization?

A. The -- some members of the ACF decided that staying together in some form was better, and they created what became to be known as the CCR.

Q. In general were those --

A. Center for Claims Resolution.

Q. Center for Claims Resolution.

In general, were those the larger ACF members or the smaller ACF members?

A. I think predominantly driven by the smaller ones.

Q. Now, you were in the courtroom earlier today when Mr. McClain testified about what he called the "OCF war".

A. Yeah, I was here for the last few minutes of it.

Q. Did you go through that war?

A. I went through the OCF period he was talking about it. I mean, as you've pointed out, Kazan and McClain and Ness, Motley and Motley, Rice have seen things differently over the years from time to time, although he and I play golf together a lot.

OCF came out with a different approach. And for the first time, OCF's way they defended their case, is to try to help us bring more people into the case.

So we would show up at a deposition of a co-worker on a plaintiff, and we would, you know, do a direct examination or it would be a discovery deposition, and Owens Corning would have a notebook or two about this thick (indicating), that had nothing but pictures of products, non-Owens Corning products. And they went meticulously through that notebook with every witness at every job site, to try to build a database of where everybody's product was used, the kind of worker that used it, and they would elicit testimony about the dustiness, and how the product was used, and you grind it off, and the frequency, and all of the things that people like to talk about in proving -- in cumulative exposure.

And Owens Corning picture books became used all over the country. And then Owens Corning would come to you and they would say, Joe, we will settle Mississippi Abrams with you -- we'll settle these cases, and we'll pay you, you know, $30,000 on average for the nonmalignant. But we want you to sue all these other people we have now proved product ID against, and give us back 25 percent or 30 percent of what you recover from them as a credit against our $30,000.

So they started wanting to help fund, finance and guarantee a level of payment. But they wanted to have the chance to get some of their money back by having us go after more defendants. And they would put together the exposure. And they put together a national database of exposure.

Q. Did you accept their invitation to do that?
A. In some cases I did.
Q. Let me call your attention to the late '90s after the collapse of Georgine and focus on the CCR. Did there come a time when the CCR adopted a nationwide settlement program?
A. They did.
Q. When was that? I don't mean to be overly exact on dates --
A. We're in the '90 -- '98/'99 timeframe here. And CC -- again, I've got a calendar. I just forgot it back in my conference center.
Q. I'm not trying to rush you --
A. They developed the CCR program and they were trying to settle cases, and setup levels of payment for nonmalignant cases, and give them what we call green cards or comeback rights, and try to get models together that we settle so many cases a year with your law firm in this jurisdiction for a couple of years. We try to control the litigation in that fashion.
Q. You spoke of comeback rights; what did you mean?
A. Asbestos exposure from the plaintiff's viewpoint causes multiple diseases. It can cause asbestos nonmalignant diseases, both involving the pleura, the pleura only, or the entire lung, internal and external part of the lung.
So you've got pleural asbestosis, you've got asbestosis,

both of those are non-cancer cases. Both of them were considered to be by the plaintiffs, to be progressive. As time goes on they will get worse, the scarring will continue to manifest and you will continue to lose lung function.

On the plaintiff's view, asbestos exposure independent of causing the nonmalignant disease process, also is an initiator and a promoter of multiple kinds of cancer, colon cancer, laryngeal cancer, other non-lung cancers, and lung cancer itself, and of mesothelioma, which is considered to be a signature cancer for asbestos exposure.

If you have nonmalignant disease, the plaintiff's view of the evidence is that you have a greater risk of getting lung cancer, than if you just have exposure, plus the latency period.

So one of the problems in trying to settle nonmalignant cases had become, how do I value my nonmalignant case to include the risk of getting lung cancer, or the risk of getting meso, if I'm going to have to release those rights now, and I don't know what's going to happen in the future?

And this is one of the things that sorted started playing on us when we tried Cimino, because our nonmalignant cases were getting higher verdicts than some of the malignant cases, some of the cancers, because of this risk factor.

So instead of paying a greater value on predicting that risk, there developed what we called "limited releases" or

"comeback rights", that you would only compensate me for the nonmalignant disease. And then if I got a lung cancer or a other cancer or I got a mesothelioma, I would have the right to come back and get an agreed to dollar amount, or have the right to go back to the jury system and have the jury valuate my loss. That's what I mean by "comeback rights" or "limited releases".

Q. Now, alongside of the national settlement program of the CCR, was any other significant player in the tort system turning to a similar strategy for resolving large numbers of cases?

A. Well, we talked about Owens Corning in their picture book period, and David calls it their war period. But they also then turned to a national settlement program period. They set up their structured settlement program. Fibreboard had already done theirs, so we're now in the 2000 timeframe.

Q. And in February 2000, you remember another significant event taking place in the tort system with the filing of a bankruptcy?

A. There was several bankruptcies filed in the 2000 timeframe.

Q. I was referring to that of Babcock and Wilcox?

A. B&W filed in Louisiana.

Q. Now, prior to that filing, had Babcock and Wilcox been a prominent litigating defendant?

A. No, Babcock and Wilcox had not been, at least in my cases, they had not been a target defendant, but they had been named in a lot of cases.

Q. They had an administrative process for resolving cases well before they filed bankruptcy?

A. They did.

Q. What was the nature of that process?

A. They were a boiler manufacturer. And they specified asbestos containing products to be used as insulation for their boilers. And then sometimes they would actually go in on the job site and put the boiler together, and they would contract with the insulation company to insulate the boiler.

So it wasn't an asbestos manufactured product, it was a boiler manufacturer. And they would pay -- they would enter settlement agreements based on the existence of their boiler at a job site.

Q. Now, as you mentioned, there followed various bankruptcies. And I think you've had a chance to look at one of the debtors' slides, which is a picture of a series of waves. Do you remember the one I had in mind?

A. I saw the drawing of the wave -- it wasn't breaking too much -- but the wave that Mr. Magee used. I thought it was pretty good.

Q. And did you observe the composition of the different bankruptcies within the different waves?

A. Yeah, it was interesting when you visualize it in the way that he did, the story that it told. At least the story that it tells me.
Q. How so?
A. Well, can we look at it? Cause it's sort of hard to --
Q. Yes. I'm looking for it here.
A. You got this nice screen here.
THE COURT: We look at movies over lunch.
THE WITNESS: That's good.
How did you get stuck with this?
BY MR. SWETT:
Q. Mr. Rice, I'll have to pull that out for you later on, I'll do so.
A. Mr. Cassada's trying to find his copy.
THE COURT: Why don't we break for lunch and come back at quarter to.
MR. SWETT: Thank you.
(Lunch recess at 12:45 p.m.)
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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NORTH CAROLINA
CERTIFICATE OF REPORTER

I, Laura Andersen, Official Court Reporter, certify that the foregoing transcript is a true and correct transcript of the proceedings taken and transcribed by me.

Dated this the 7th day of August, 2013.

s/Laura Andersen
Laura Andersen, RMR
Official Court Reporter